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Supreme Court, U.S.
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No. 09-1443 MAY 25 2010

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IN THE

SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

JOHNATHAN ANDREW DOODY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

APPENDICES B – F TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX B

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DISTRICT OF ARIZONA
BY s/_____DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZIONA

Jonathan Andrew Doody,	) No. 98-0528 PHX-EHC
	) (LOA)
Plaintiff,	)
	) **AMENDED REPORT AND**
vs.	) **RECOMMENDATION**
	) **AND ORDER**
Meg Savage, et al.,	)
	)
Defendants.	)
	)

This matter arises on Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (document # 1) alleging the following grounds for habeas relief:

1) Police failed property to administer Petitioner's Miranda[1] rights;

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[1] Miranda v. Arizona, 394 U.S. 436 (1966).

2) Petitioner's confession was involuntary in violation of the Due Process Clause; and

3) The trial court improperly prohibited Petitioner from arguing to the jury that the confessions of the "Tucson Four", which were determined to be false, demonstrated the unreliability of Petitioner's confession.

(documents # 1; #2 at i)

On December 6, 1999, the undersigned issued a Report and Recommendation recommending that the Petition be denied. (document # 12). On April 3, 2003, the District Judge referred this matter back to the undersigned for further consideration in view of the Ninth Circuit's decision in Alvarado v. Hickman, 316 F.3d 841 (9th Cir. 2003), *cert. granted*, Yarbough v. Alvarado, 2003 WL 21229273 (2003). That same day, the undersigned directed the parties to submit supplemental briefing which they have done. (document # 24, # 28, #31)

After review of the record in this matter, the undersigned issues this Amended Report and Recommendation. Although the Amended Report and Recommendation supersedes the 1999 report and Recommendation, in the interest of clarity, the Court will vacate the earlier Report and Recommendation. (document # 12)

FACTUAL AND PROCEDURAL BACKGROUND

On February 11, 1992, the State of Arizona (the "State") charged Petitioner with nine counts of first degree murder, nine counts of armed robbery, and one count of conspiracy to

commit armed robbery. (document # 7) The following events gave rise to the charges.

On August 10, 1991, members of the Wat Promkunaram Buddhist Temple discovered nine dead bodies in the temple (the "Temple Murders"). (Appendix to document # 2 at A.2) The victims, each shot in the head, were lying face-down in a circle. (Id.) The temple had also been ransacked, various items were missing, including money, cameras, and stereo equipment. (Id.) The police later identified the murder weapon as a .22 caliber rifle manufactured by the Marlin Company (the "Marlin Rifle"). (Id.)

In September 1991, detectives received an anonymous tip implicating four men from Tucson (the "Tucson Four") in the Temple Murders. (Id.) The suspects made inculpatory statements during questioning prompting the State to charge them with the Temple murders. (Id.)

Thereafter, on October 10, 1991, two police officers, in particular Detectives Sinsabaugh and Harris, interviewed Petitioner regarding the Temple Murders. (document # 7, Exh. D at 58, 60) At that time, Petitioner was living with Michael Myers, Alex Garcia, and Rolando Caratachea. (document # 7, Exh. D at 56, Exh. I at 96-98, J at 45) Petitioner told police that his mother and step-father, Brian Doody, were moving to Colorado because his step-father had been transferred to Falcon Air Station. (document # 7, Exh. A at 116, D at 62-63) At a later point in the investigation, police arranged for Brian Doody and Petitioner's brother, David, to come to Phoenix to talk with police. (document # 7, Exh. D at 68, I at 94; J at 36) Police wanted to talk with David, who had been a member of the Temple, about the Temple and to identify property that had potentially been recovered from the Temple. (document # 7, Exh. D at 69-70, 139; I at 95; J at 37-38) Police paid travel

expenses and one night's lodging for Brian and David Doody. The two were interviewed on October 24, 1991 and began their return trip to Colorado the next day. (document # 7, Exh. B at 112-14, 117-18, C at 75-76; D at 71-72; J at 36)

In the meantime, police investigators had issued an advisory directing all law enforcement agencies to report any Marlin rifles. (Appendix to Document # 2 at A.2) A report came in from Luke Air Force Base that a Marlin rifle had been discovered during a search of a vehicle that had been stopped for an unrelated incident, and that Rolando Caratachea owned the rifle. (appendix to document # 2 at A.3) On October 24, 1991, investigators identified Caratachea's rifle as the murder weapon. (Respondents' Exh. S at 116-21; Exh. T at 195-226, 78-83[2]) On October 25, 1991, police questioned Caratachea who denied involvement in the murders and claimed that two minors, Petitioner and Alessandro (Alex) Garcia, had borrowed the rifle shortly before the incident. (Appendix to document # 2 at A.3; document # 7; Exh. I at 99-100) That evening detectives located Petitioner at an Agua Fria high school football game and asked if he would voluntarily accompany the detectives to the police station. (document # 7 Exh. A at 144-45, 149-50, 152-55, 159; Exh. B. at 54-60, 140, 142) Petitioner agreed. He opened the door of the police car and let himself into the back seat. (Id.) Petitioner was neither handcuffed nor searched. (document # 7, Exh. A at 154, Exh. B at 60-61, 65-67, Exh. I at 103)

When Petitioner arrived at police headquarters at 9:10 p.m., police read him juvenile Miranda warnings. (Appendix to

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[2] Unless otherwise indicated, citations to "Respondents' Exh. ___" are to exhibits attached to document # 7, Respondents' May 8, 1998 Answer to Petition for Writ of Habeas Corpus.

document # 2 at A.40-53; document # 7, Exh. B at 69, 77-78, 146, 148-54; Exh. D at 37; I at 102) Petitioner was then taken to a "well lit" room that was 10 feet by 18 feet, with carpeted floors and three padded chairs. (document # 7, Exh. B at 69, 70, 74) Petitioner agreed to speak to the detectives without his parents or an attorney present. (Appendix to document # 2 at A.3, A.40-53; document # 7 Exh B at 82, 147, Exh. D at 38) Police told Petitioner that they were going to ask him about the Temple murders and Caratachea's rifle. (document # 7, Exh. B at 88-89) They also told Petitioner he could stop the questioning at any time, and that he should ask if he "had a question about anything." (document # 7, Exh. B at 81, 88) Police also told Petitioner to ask he if wanted anything to eat or drink, or needed a break to use the bathroom. (Id. at 81, 89) Petitioner used the bathroom at least twice during the interview. (Id. at 162) Questioning continued until after 10:00 a.m. the next morning. (Appendix to document # 2 at A.3; and document # 28 Exh. B at 69, 146) Petitioner was interrogated by Detective Riley, Detective Dave Munley, Detective Sinsabaugh, and Captain Jerry White. A microphone allowed those outside of the interrogation room to hear the interrogation. (document # 7, Exh. B at 78-79) The interrogation was tape recorded, although Petitioner was not aware he was being taped. (Id. at 157-58)

During the interrogation, Petitioner told police that his parents had moved to Colorado and that he had since lived with several friends. (document # 7, Exh. B at 83) In August of 1991, Petitioner signed the lease for an apartment with Mike Myers and Rolando Caratachea. (Id. at 84-5, 151) He said that he had worked at McDonald's and was currently working at the commissary at Luke Air Force Base. (document # 7, Ex. B at 84) He also stated that he was "in charge" of the ROTC Honor Guard and Color guard. (Id. at 84, 150)

About 1 ½ to 2 hours into the interrogation, Petitioner admitted that he and Garcia had borrowed Caratachea's rifle. (document # 7, Exh. B at 99, 164, 169; Exh. C at 18, 23, 27) Petitioner modified his account of the events throughout the course of the questioning, but he ultimately admitted to being at the temple the night of the Temple Murders. (Id., cassette tape # 10[3]) Petitioner stated that Caratachea and Garcia approached him with a plan to play a "war game" which involved surrounding the temple without tripping the securing system. (Id. at A.3, cassette tape # 10) Petitioner stated that he devised the system to get passed the security sensors. (cassette tape # 11) Then, on August 9, 1991, Petitioner accompanied Caratachea, Garcia, George Gonzalez, and several others to the temple. (Id.) Petitioner claimed that he did not intend to enter the temple, but that he followed the others into the temple after passing through the security sensors. (Id.) Petitioner stated that Caratachea, Garcia, Gonzalez, and the others ransacked the temple and ordered the victims into the main temple. (Id. at A.3-A.4, cassette tape # 10) Petitioner stated that one of the monks recognized Gonzalez who told Petitioner to go outside to determine whether the walls were sound proof. (Id. at A.4) Petitioner claimed that the shooting occurred while he was outside. (Id.)

Investigators also interviewed Garcia who told investigators that Petitioner approached him with a plan to rob the temple and that Petitioner insisted that they leave "no witnesses." (Id.) Garcia further stated that Petitioner shot the victims. (Id.) Thereafter, investigators searched Garcia's home and found several items that were missing from the temple and

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[3] Citations to "cassette tape #" are to audio cassettes of Petitioner's interrogation on October 25, 1991.

a gun determined to have fired shotgun shells recovered from the scene. (Id. at A.4)

Based on the confessions and the evidence, the State arrested and charged Petitioner and Garcia with the Temple Murders and dismissed the charges against the Tucson Four. (Id. at A.4)

Following a juvenile transfer hearing, the court ordered that Petitioner and Garcia stand trial as adults.[4] (Id. at A.4-A.5) During the pretrial proceedings, both moved to suppress their confessions. (Id.) The trial court conducted a ten-day suppression hearing. (document # 7, Exh. A-L) The State presented eleven witnesses at the suppression hearing including the four officers who conducted the interrogation. The audiotapes of the interrogation and transcripts of the tapes were also introduced in evidence. (document # 7, Exh. B at 93-96) Petitioner did not testify. At the outset of the hearing, the court stated that it has listened to the cassette tapes of the interrogation. (document # 7, Exh. A at 6, Exh. B at 93) The court also noted that the transcripts of those tapes appeared accurate. (document # 7, Exh. A at 6; Exh. C at 26) The court denied the motions to suppress.

After the suppression hearing, Garcia entered a plea agreement pursuant to which he agreed to testify against Petitioner. (Id. at A.5) The state proceeded to trial against Petitioner and the jury convicted

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[4] The Honorable Gregory H. Martin presided over the proceedings in CR 92-01232 in the Superior Court of Arizona, Maricopa County.

Petitioner on nine counts of first degree murder and one count of burglary. (Id.) The trial court rejected the State's request for the death penalty, and sentenced Petitioner to nine consecutive life terms on the murder counts and eleven additional prison terms on the remaining counts. (Id. at A.5-A.6)

Petitioner appealed to the Arizona Court of Appeals raising five issues: (1) the trial court erred in failing to suppress his confession; (2) the trial court erred in restricting the nature of the testimony Petitioner could elicit from the Tucson Four; (3) the trial court erred in restricting Petitioner's cross-examination of Garcia; (4) the trial court erred in permitting Caratachea to invoke his right to remain silent; and (5) the trial court erred in excluding James Herron's testimony. (Respondents' Exhs. ZZ, AAA, BBB)

The Arizona Court of Appeals affirmed the convictions and sentences. (Appendix to document # 2 at A.35) The Arizona Supreme Court denied review on January 14, 1997 and the United States Supreme Court denied certiorari on June 16, 1997. Doody v. Arizona, 520 U.S. 1275 (1997). Thereafter, Petitioner filed the pending Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254. (document # 1)

STANDARD OF REVIEW

On April 24, 1996, the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L.No. 104-132, 110 Stat. 1214 was signed into law. Because Petitioner filed his petition after the effective

date of the AEDPA, it applies to this proceeding. See, Benn v. Lambert, 283 F.3d 1040, 1051 (9th Cir. 2002).

The AEDPA "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas retrials and to ensure that state-court convictions are given effect to the extent possible under the law." Bell v. Cone, 535 U.S. 685, 122 S.Ct. 1843, 1849 (2002)(citing Williams v. Taylor, 529 U.S. 362, 403-04 (2000)). Congress enacted the AEDPA "to restrict the availability of habeas corpus relief." Greenawalt v. Stewart, 105 F.3d 1268, 1275 (9th Cir. 1997). Section 2254(d) creates a "highly deferential standard for evaluating state-court rulings." Lindh v. Murphy, 521 U.S. 320, 334 n. 7 (1997). Under the AEDPA, a state prisoner is not entitled to habeas relief with respect to any claim that was adjudicated on the merits in state court unless adjudication of the claim:

> (1) resulted in a decision that was *contrary to*, or involved an *unreasonable application* of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an *unreasonable determination* of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d)(emphasis added).

The Supreme Court has considered the "contrary to" and "unreasonable application" clauses of section

(1) and found that they have independent meanings.

> A federal habeas court may issued the writ under the "*contrary to*" clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts. The court may grant relief under the "*unreasonable application*" clause if the state court correctly identifies the governing legal principles from our decisions but unreasonably applies it to the fact of the particular case. The focus on the latter inquiry is on whether the state court's application of clearly established federal law is *objectively unreasonable*, and we stressed in Williams that an unreasonable application is different from an incorrect one.

Bell, 122 S.Ct. at 1850 (internal citations omitted)(emphasis added). The federal habeas court may not "substitute its own judgment for that of the state court" and grant habeas relief based solely on an incorrect application of federal law; rather, the application of federal law must also be objectively unreasonable." Lockyer v. Andrade, 538 U.S. 63, 123 S.Ct. 1166, 1174 (2003)(stating that the "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous, rather it must be objectively unreasonable.) Woodford v. Visciotti, 537 U.S. 19, 123 S.Ct. 357, 361 (2002)("The federal habeas scheme leaves primary responsibility with the state courts for these judgments, and authorizes federal-court intervention only when a state-court decision is

objectively unreasonable.")

In determining whether the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law," the phrase "Federal law" refers to United States Supreme Court precedent. Ramdass v. Angelone, 530 U.S. 156, 165-66 (2000); Williams, 529 U.S. at 403-04. Thus, circuit court case law "may be persuasive authority for purpose of determining whether a particular state court decision is an "unreasonable application" of Supreme Court law, and also may help [courts] determine what law is "clearly established." Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 1999)(citing MacFarlane v. Walter, 179 F.3d 1131, 1139 (9th Cir. 1999).

In evaluating the state court decision, federal courts must not "mischaracterize[e] the state court opinion" or record, and must defer to "the presumption that state courts know and follow the law." Visciotti, 123 S.Ct. at 3690-61(reversing the Ninth Circuit's granting habeas relief, finding the state court opinion rejecting a claim of ineffective assistance of counsel was not contrary to or an unreasonable application of federal law.) If the state court neither explains its ruling on the merits nor cites Unites States Supreme Court precedent, the district court must still rely on U.s. Supreme Court law to decide whether the state court reasonably applied federal law. Early v. Packer, 537 U.S. 3, 8, 123 S.Ct. 362, 365 (2002). The Supreme Court has held that citation to federal law is not required and that compliance with the habeas statute "does not even require *awareness* of our cases, so long

as neither the reasoning nor the result of the state-court decision contradicts them." Id. (emphasis in original)

With respect to the "unreasonable determination of the facts" prong, the Supreme Court has stated that "factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, 28 U.S.C. § 2254(c)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding. . . ." Miller El v. Cockrel, 537 U.S. 322, 123 S.Ct. 1029, 1041 (2003); See Torres v. Prunty, 223 F.3d 1103, 1108 (9th Cir. 2000)(stating that the standards governing reasonableness under § 2254(d)(2) are the same for unreasonableness under § 2254(d)(1).

Petitioner bears the burden of establishing that his detention violates the U.S. Constitution or laws of the United States. 28 U.S.C. § 2254(e)(1). A presumption of correctness applies to the states courts' factual determinations, and credibility determinations. Bragg, 242 F.3d at 1087 (citing Sumner v. Mata, 449 U.S. 539, 546-47 (1981)). In attempting to establish his claims for habeas relief, a state prisoner is limited to the factual assertions made in state court in support of properly exhausted claims, and he may not alter or expand those assertions in federal court. See, Baja v. Ducharme, 187 F.3d 10975, 1079 (9th Cir. 1999)(rejecting a claim that the prisoner was entitled to an evidentiary hearing: "State law not only permitted but required [the prisoner] to come forward

with affidavits or other evidence, to the extent that his claim relied on evidence outside the trial record.")

Where the AEDPA standards have been met, to grant relief under § 2254(d)(1), the District Court must also find that the state court's error was actually prejudicial — the error must have "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637-38 (2001)("Because this case involves a petition for writ of habeas corpus, and because the improper jury instruction was a trial-type error, Brecht . . . controls."); Bains v. Camra, 204 F.3d 964, 977 (9th Cir.2000)("we now join the vast majority of our sister circuits by deciding that the Brecht standard should apply uniformly in all federal habeas corpus cases under [28 U.S.C. §] 2254"). This is true even if the state court did not conduct a harmless error analysis. Bains, 204 F.3d at 977-78.

In addition to the foregoing, 28 U.S.C. § 2254(b)(1), still requires a petitioner to exhaust his state court remedies before seeking federal review:

> An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that:
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

The Court, however, may deny a petition on the merits event though it contains unexhausted claims. 28 U.S.C. § 2254(b)(2). The Court will address the issue of exhaustion below before addressing the merits of Petitioner's claims.

EXHAUSTION AND PROCEDURAL DEFAULT

Under 28 U.S.C. § 2254(b)(1), a state prisoner must exhaust available state court remedies before the federal court will consider a habeas corpus petition. 28 U.S.C. 2254(b) (stating that a state prisoner must present all claims on direct or collateral appeal in state court proceedings before a federal court will consider a habeas corpus petition); Rose v. Lundy, 455 U.S. 509 (1982); Lindquist v. Gardner, 770 F.2d 876, 877 (9th Cir. 1985). To properly exhaust state remedies, a prisoner must "fairly present" his claims to the appropriate state courts in a procedurally proper manner. Swoopes v. Sublett, 196 F.3d 1008, 1009-10 (9th Cir. 1999); Middleton v. Cupp, 7i68 F.2d 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986); McQuown v. McCartney, 795 F.2d 807, 809 (9th Cir. 1986). A claim is fairly presented if the prisoner has described the operative facts and legal theories upon which the claim is based. Picard v. Connor, 404 U.S. 270, 277-78 (1971). It is not sufficient that all the facts necessary to support the federal claim were before the state courts or that a "somewhat similar" state law claim was made. Duncan v. Henry, 513 U.S. 364, 366 (1995). Rather, the prisoner "must specifically indicate

to [the state] court that those claims were based on federal law." Lyons v. Crawford, 232 F.3d 666 668 (9th Cir. 2000). "The petitioner must make the federal basis of the claim explicit either by citing federal law or the decisions of the federal courts, even if the federal basis is 'self-evident.'..." Id.

New factual allegations render a claim unexhausted when they fundamentally alter the legal claim considered by the state court. Vasquez v. Hillery, 474 U.S. 254, 26i0 (1986). Federal courts should not "entertain new evidence that places [a] claim in a significantly different posture, when that evidence was never presented to the state courts." Nevius v. Sumner, 852 F.2d 463, 470 (9th Cir. 1988).

If a petition seeking federal habeas corpus relief failed to fairly present his claims to the state court in a procedurally appropriate manner, the claim is procedurally defaulted and barred from federal review. Ylst v. Nunnemaker, 501 U.S. 797, 802-05 (1991). There are two types of procedural default. First, a state court may have expressly applied a procedural bar when the prisoner attempted to raise the claim in state court. Ylst, 501 U.S. at 802-05. If a state court applies a procedural bar such as waiver or preclusion, but proceeds to alternatively address the merits of the federal claim, the claim remains barred from federal review. Ylst, 501 U.S. at 802-05. A later "silent" denial of review affirms the lower court's application of a procedural bar. Ylst, 501 U.S. at 803.

Second, a prisoner may not have presented the claim in state court, but pursuant to the state court's

procedural rules, a return to state court would be futile. See, Teague v. Lane, 489 U.S. 288, 297-99 (1989).

Where petitioner has procedurally defaulted a claim, federal habeas review is only available if the prisoner establish "cause" for the procedural default and "actual prejudice" from the alleged constitutional error, or establishes a "fundamental miscarriage of justice." To establish cause, a petitioner must demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rules." Coleman, 501 U.S. at 753. "Prejudice" is actual harm resulting from the alleged constitutional error. Murray v. Carrier, 477 U.S. 478, 494 (1986). A prisoner must demonstrate that the alleged constitutional violation "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170 (1982).

Under the fundamental miscarriage of justice exception, a prisoner must establish that he is actually innocent of the crime. Actual innocence means that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 327 (1995). To establish the requisite probability the "petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Id.

In this case, Petitioner presented the claims raised in his pending § 2254 Petition to the Arizona

Court of Appeals, the Arizona Supreme Court, and the Supreme Court of the United States. Petitioner, therefore, has exhausted his claims. Although Petitioner presented his claims to the state court, they may still be procedurally barred if his claims were not presented in a procedurally appropriate manner. Here, Respondents assert that Petitioner procedurally defaulted his third claim challenging the exclusion of evidence regarding the "Tucson Four."

I. Whether Petitioner Procedurally Defaulted Claim Three

In his third claim, Petitioner argues that the trial court violated the due process clause by excluding testimony from the Tucson Four which Petitioner claims was "relevant to establish the truth or falsity of [Petitioner's] confession." (document # 2 at A.21) Petitioner bases this claim on the trial court's ruling that Petitioner could offer evidence of the Tucson Four confessions only for their truth in support of a defense theory that the Tucson Four, not Petitioner, committed the Temple Murders. Respondents argue that this claim is procedurally barred because the state court denied it on the basis of an independent state law pursuant to which the claim was procedurally barred. To determine whether Petitioner's claim is procedurally barred, the Court looks to the Arizona court of Appeals' opinion because it is the last reasoned state court opinion. See, Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991)(explaining that where the last reasoned opinion of a state court rests on state procedural default, later decisions presumably rest on the same ground.)

On appeal, Petitioner argued that, absent the trial court's ruling, he would have "presented evidence of improprieties in the Tucson Four interrogations and could have proved and argued that his own confession, which he attributes to the 'same police officers using many of the same interrogation techniques,' was false, as were the Tucson Four confessions." (Id. at A.17) The Court of Appeals found that Petitioner's "argument on appeal, that testimony and confessions by the Tucson Four were admissible to show that Petitioner's confession was involuntary, however, is not only different from, but also inconsistent with the basis on which [Petitioner] urged their admissibility at trial." (Id. at A.17-18) Accordingly, relying on State v. Serna, 163 Ariz. 26i0, 267, 787 P.2d 1056, 1063 (Ariz. 1990), the Court of Appeals concluded that Petitioner's due process claim was procedurally barred because Petitioner may not assert an evidentiary theory for the first time on appeal. (Id.)

The Court of Appeals explained that:

> The question whether [Petitioner] could use the Tucson Four confessions first arose in the context of a motion in limine through which the state sought to preclude the defense from using statements by the Tucson Four. The state . . . argued that the Tucson Four statements should be excluded as unreliable and irrelevant. In response, [Petitioner] asserted that the statements were relevant to his defense that the Tucson Four, not [Petitioner], committed the Temple Murders and that a reasonable person

> could believe their confessions to be true. [Petitioner] gave no indication whatever that he intended to use the statements to establish that, because the Tucson Four confessions were not reliable, [Petitioner's] admissions also were not reliable.

(Id. at A.18)

The Court of Appeals further noted that, at a later point in the proceedings when the trial court was discussing the Tucson Four testimony with defense counsel, "[a]s had been true during earlier proceedings, [Petitioner] did not assert any intention of drawing parallels between the Tucson Four and [Petitioner's] interrogations." (document # 2 at A.19) Finally, the Court of Appeals concluded that:

> [Petitioner's] averments to the court that he intended to present the Tucson Four evidence to establish the truth of their confessions, his failure to offer the Tucson Four evidence for the purpose of proving the falsity of his confession, and his failure to define which similarities he regarded as providing sufficient basis for comparing the confessions, lead us to conclude that [Petitioner] waived this argument on appeal.

(document # 2 at A.22)

In the pending Petition, Petitioner argues that, contrary to the Court of Appeals' finding, his due process claim based on the trial court's evidentiary

ruling is not procedurally barred because: (1) the Court of Appeals' decision dose not rest on an "adequate and independent" state law ground; and (2) the record does not support the Court of Appeals' decision. The Court will address these arguments in turn.

A. Adequate and Independent State Ground

1. Legal Doctrine

Pursuant to the independent and adequate state ground doctrine a federal court is precluded from reaching a state prisoner's habeas corpus claim when a state-law default prevented the state court from considering the merits of that claim. Thomas v. Lewis, 945 F.2d 1119, 1122 (9th Cir. 1991)(citing Ylst v. Nunnemaker, 501 U.S. 797 (1991); Wainwright v. Sykes, 433 U.S. 7i2, 87-88 (1977).

To assist courts in determining whether a state court decision rests on an adequate and independent state ground, the Supreme Court developed the following presumption:

> federal courts on habeas corpus review of state prisoner claims are to presume that there is no independent and adequate state ground for a state decision when the decision fairly appears to rest primarily on a federal law unless the state court's opinion contains a 'plain statement' that its decision rests upon independent and adequate state grounds.

Thomas, 945 F.2d at 1122 (finding that state court

decision rested on an adequate and independent state ground where, although the state court addressed petitioner's claims on the merits, the court prefaced its discussion with a statement that petitioner had waived all of his claims and indicated that it addressed the merits only as an "alternative" basis for its decision)(citing Michigan v. Long, 463 U.S. 1032, 1040-41 (1983); Harris v. Reed, 489 U.S. 255 (1989)). See also, Coleman v. Thompson, 501 U.S. 722, 735 (1991)(finding that state court's decision rested on an independent and adequate state ground where state court dismissed petitioner's claims based on his failure to comply with the State Supreme Court's procedural rules.) This presumption applies only "where a federal court has good reason to question whether there is an independent and adequate state ground for the decision. . . ." Coleman, 501 U.S. at 739. The Supreme Court explained that "[t]here is . . . little that the federal courts will gain by applying a presumption of federal review in those cases where the relevant state court decision does not fairly appear to rest primarily on federal law or to be interwoven with such law, and much that the State and State courts will lose." Id. at 740.

To further assist courts in applying the "independent and adequate" state law doctrine, the Court has clarified that:

> [w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground. If an earlier opinion 'fairly appear[s] to

> rest primarily upon federal law, (citation omitted) we will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place. Similarly, where . . . the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits.

Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991).

As discussed below, the Court concludes that the Arizona Court of Appeals' decision rests on an adequate and independent state ground, and therefore, review of Petitioner's due process claim is procedurally barred unless he can establish cause and prejudice or a fundamental miscarriage of justice.

2. Analysis

Here, although the Arizona Court of Appeals alternatively addressed the merits of Petitioner's due process claim, it relied on the procedural bar as an independent basis for rejecting Petitioner's claim.

First, in addressing Petitioner's due process claim, the Court of Appeals noted that Petitioner's argument on appeal was not only different from, but was also inconsistent with, his argument at trial that the confessions of the Tucson Four established that the Tucson Four, not Petitioner, committed the Temple Murders. (document # 2 at A.17) The Court of Appeals

then stated that "[b]ecause a party may not assert an evidentiary theory for the first time on appeal, State v. Serna, 163 Ariz. 260, 787 P.2d 1056i, 1063 (Ariz. 1990), we reject this claim." (Id. at A.18) In reaching this conclusion, the Court of Appeals emphasized that on two separate occasions when the Court discussed with counsel the purposes for which Petitioner could offer the testimony of the Tucson Four at trial, Petitioner failed to "assert any intention of drawing parallels between the Tucson Four and [Petitioner's] interrogation." (document # 2 at A.19, A.18)

Only after finding that Petitioner had waived his due process claim did the Court of Appeals address the merits of Petitioner's claim that "the trial court, by foreclosing an argument that his confession, like those of the Tucson Four, was false, violated the principles set forth in Crane v. Kentucky, 476 U.S. 683 (1986)." (document # 2 at A.20) The Court of Appeals concluded that Petitioner's claim failed on the merits because Crane did not apply. (Id.)

After addressing the merits of Petitioner's claim, the Court of Appeals reiterated that "Petitioner failed to preserve for appeal the issue of whether the trial court should have admitted the Tucson Four evidence as relevant to establish the truth or falsity of [Petitioner's] confession." (document # 2 at A.21) Finally, the Court of Appeals concluded that {Petitioner "waived this argument on appeal." (Id. at A.22)

Although the Arizona Court of Appeals briefly discussed the merits of Petitioner's federal due process

claim as an alternative basis for denying the claim, its decision does not "fairly appear to rest primarily on a federal law." Rather, the Court of Appeals specifically relied on a state procedural rule in rejecting Petitioner's due process claim. "The fact that the court went on to discuss the lack of merit of [Petitioner's claim] does not eliminate the procedural bar." Harris v. Reed, 489 U.S. 255, 264 n. 10 (1989). See also, Coleman, 501 U.S. at 735 (finding that state court's decision rested on an independent and adequate state law ground where state court dismissed petitioner's claims based on his failure to comply with the State Supreme Court's procedural rules); Poland v. Stewart, 169 F.3d 573, 586-87 (9th Cir. 1998)(finding that trial court's decision that petitioner's claim was waived under Ariz.R.CrimP. 32.2(a)(3) constituted an adequate and independent ground sufficient to bar federal review despite the fact that the court also found that petitioner's claim lacked merit); Thomas v. Lewis, 945 F.2d 1119, 1122-23 (9th Cir. 1991)(finding that state court decision rested on an adequate and independent state law ground where, although state court addressed petitioner's claims on the merits, the court prefaced its discussion with a statement that petitioner had waived all of his claims and indicated that it addressed the merits only as an "alternative" basis for it decision).

Based on the foregoing, the Court finds that Petitioner procedurally defaulted his claim that the trial court violated due process by prohibiting Petitioner from arguing to the jury that, if the jury concluded that the Tucson Four confessions were false and unreliable, the jury could likewise infer that

Petitioner's confession was false and unreliable.

B. Support for Court of Appeals' Decision

In the alternative, Petitioner argues that the record does not support the State court's finding that Petitioner waived his due process claim. The Court of Appeals' decision that Petitioner waived his challenge to the trial court's evidentiary ruling is based on the Court of Appeals' interpretation of state law as set forth in State v. Serna, 163 Ariz. 260 (Ariz. 1990). As discussed in Section II. A, *supra*, the record supports the State court's determination that Petitioner waived his due process claim. Because Petitioner procedurally defaulted his due process claim in state court pursuant to an adequate and independent state rule, the Court should not reach the merits of that claim unless Petitioner establishes either cause and prejudice as a result of the alleged violation of federal law, or that failure to review his claim will result in a fundamental miscarriage of justice. Coleman, 501 U.S. at 748.

II. Bases for Overcoming Procedural Bar

Petitioner may overcome the procedural bar if he establishes "cause and prejudice" or a "fundamental miscarriage of justice."

A. Cause and Prejudice

"'Cause' is the legitimate excuse for default; 'prejudice' is the actual harm resulting from the alleged constitutional violation." Magby v. Wawrzaszek, 741 F.2d 240, 244 (9th Cir. 1984). If

petitioner fails to establish cause for his procedural default, the court need not consider whether petitioner has shown actual prejudice resulting from the constitutional violation. Smith v. Murray, 477 U.S. 527, 533 (1986). "Cause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from construction or raising the claim." Murray v. Carrier, 477 U.S. 478, 488 (1986).

In an attempt to establish cause, Petitioner argues that trial counsel believed that he had made a sufficient objection to the trial court's ruling regarding the Tucson Four testimony. (document # 9 at 10-11) At most, Petitioner asserts *attorney error* as cause for his procedural default. Although ineffective assistance of counsel may constitute cause to excuse procedural default, "*attorney error* short of ineffective assistance does not constitute cause." *Murray*, 477 U.S. at 492 (emphasis added). Likewise, "[a]ttorney inadvertence or ignorance of the law does not establish cause for procedural default." Vansickel v. White, 166 F.3d 953, 958 (9th Cir. 1999). Accordingly, Petitioner cannot establish cause for his procedural default.

B. Fundamental Miscarriage of Justice

Although Petitioner fails to establish cause and prejudice, he could overcome the procedural bar by establishing that failure to consider his due process claim would result in a fundamental miscarriage of justice. The circumstances constituting a fundamental miscarriage of justice are extremely "narrow" and apply only to "extraordinary case[s]." Schlup v. Delo,

115 S.Ct. 851, 860-61, 864 (1995); see, Murray v. Carrier, 477 U.S. at 495-96. Accordingly, the Supreme Court has "explicitly tied the miscarriage of justice exception to the petitioner's innocence." Schlup, 115 S.Ct. at 864. After review of the record, the Court cannot conclude that failure to consider the merits of Petitioner's due process claim would result in a fundamental miscarriage of justice. Because Petitioner has neither established cause and prejudice nor a fundamental miscarriage of justice to excuse his procedural default, federal habeas review is barred. However, in an abundance of caution, the Court will address the merits of Petitioner's due process claim in section III of the Analysis section below.

ANALYSIS OF PETITIONER'S CLAIMS

As previously stated, to prevail on a writ of habeas corpus, Petitioner must establish that the state decision is contrary to federal law or that the state decision rests on an unreasonable application of federal law or an unreasonable determination of the facts in view of the evidence presented. 28 U.S.C. § 2254(d). The Court will consider Petitioner's claims under this standard.

I. Claim One: Whether Police Violated Petitioner's Miranda Rights

In his first claim, Petitioner argues that his "conviction is constitutionally defective because it rests on a confession obtained in violation of his rights under Miranda v. Arizona, 384 U.S. 436 (1966)." (document # 2 at 16) In support of this claim, Petitioner argues

that "[t]he warnings given to [Petitioner] . . . did not satisfy Miranda's mandate . . . [because] the officers used language which was calculated to—and which did—obscure and downplay the importance of what [Petitioner] was being told." (document # 2 at 18) In opposition, Respondents assert that Petitioner's claim fails because he cannot establish that the state court's decision rests on an unreasonable application of federal law or an unreasonable determination of the facts. (document # 7 at 16)

A. Clearly Established Federal Law

In Miranda v. Arizona, the Supreme Court developed "procedural safeguards" to protect the Fifth Amendment privilege against self incrimination when an individual is taken into custody or otherwise deprived of his liberty. 384 U.S. 436, 478 (1966).[5] Specifically, the Miranda Court held that, before questioning, an individual must be warned "that he has a right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." Id. at 479. The Miranda Court explained that "[t]he warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant." 384 U.S. at 476

[5] For purposes of this discussion, the Court assumes without deciding that Petitioner was "in custody" for purposes of Miranda during the relevant period.

(emphasis added). Thus, Miranda, does not require a "talismanic incantation to satisfy its strictures." California v. Prysock, 453 U.S. 355, 360 (1981). "Reviewing courts, therefore, need not examine Miranda warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by Miranda.'" Duckworth v. Eagan, 492 U.S. 195, 203 (1989)(quoting Prysock, 453 U.S. at 361).

B. Analysis of Miranda Claim

Here, Petitioner argues that the warnings which police gave him before questioning fail to satisfy Miranda because "the officers used language which was calculated to — and which did — obscure and downplay the importance of what [Petitioner] was being told." (document # 2 at 18) In support of his claim, Petitioner cites the following statements which police made while reading Petitioner his Miranda rights:

> They call it rights on t.v., okay. What, what that is and basically all that is Jonathan is, it's not necessarily something that is, like on t.v. where they portray it when somebody's ah guilty of doing something, ah, we read these things to people on somewhat of a regular basis, whether they're responsible for doing something or not, okay. So I don't want you to feel that because I'm reading this to you that we necessarily that you're responsible for anything. It's for your

> benefit, it's for your protection and for ours as well, okay?

(document # 2 at 19)(citing document # 2 at A.42) Petitioner also cites the following statements as evidence that police downplayed the importance of the warnings are "to save time," "to get you back to what you need to do," to "get things squared away," and the warnings are "for your benefit and for our benefit." (document # 2 at 18)(citing document # 2 at A.40, A.41, A.47) Finally, Petitioner claims that police "blatantly misadvised" him of his right to counsel and cites the following portion of the warnings in support of his claim:

> [A]n attorney is a lawyer who will speak for you and help you concerning the crime or any kind of offense that . . . we might think that you or somebody else is involved in, if you were involved in it, okay. Again, it (sic) not necessarily means that you were involved, but if you were, then that's what that would apply to okay.

(document #2 at 20)(citing document # 2 at A.49)

Petitioner presented this claim to the Arizona Court of Appeals. (document # 2 at A.14-A.17) The Court of Appeals "accept[ed] [Petitioner's] characterization of the questioning as custodial interrogation requiring Miranda warnings." (document # 2 at A.16) The Court of Appeals then concluded that "the officers advised [Petitioner] of his Miranda rights in a clear and understandable manner and that

[Petitioner] made a knowing and intelligent waiver." (Id. at A.16) The Court of Appeals determined that the officers: (1) advised Petitioner of his right to have a parent or guardian present, (2) advised Petitioner that he could be tried as an adult, (3) read Petitioner Miranda rights from a standard juvenile form and provided explanations where appropriate, and (4) after reading each warning, asked Petitioner if he understood the right involved and obtained his initials on the form. (Id.) The Court of Appeals found that the officers explained Petitioner's Miranda rights in a manner appropriate for Petitioner's age, intelligence, and experience with the justice system. (document # 2 at A.17) The Court agrees and finds that the Court of Appeals' decision comports with federal law and is not an objectively unreasonable determination of the facts or application of federal law. See, 28 U.S.C. § 2254(d).

As previously stated, Miranda does not require a verbatim reading of the warnings set forth in that decision. Rather, Miranda mandates that, before custodial interrogation, police give warnings sufficient to convey the core rights which Miranda guarantees. See, 384 U.S. at 476. Here, before reading Petitioner his Miranda rights from a standard juvenile form, police inquired as to Petitioner's educational background as well as his school and community activities to establish Petitioner's ability to understand his rights. (Respondents' Exh. B at 80-85) In response to the investigator's questions, Petitioner informed police that he was in the eleventh grade, maintained a "B" average, was in charge of the R.O.T.C. Honor Guard and the R.O.T.C. Color Guard, had worked at McDonald's in the past, and was presently employed at

the commissary at Luke Air Force Base. (Respondents' Exh. B at 80-85) After assessing Petitioner's ability to comprehend the warnings, police read Petitioner the following warnings: (1) "you have the right to remain silent," (2) "[a]nything you say can and will be used against you in a court of law," (3) "you have the right to have an attorney present prior to and during questioning," and (4) "if you cannot afford an attorney, you'd have the right to have one appointed for you prior to questioning." (document # 2 at A.49) Police also inquired whether Petitioner wanted a parent or guardian present. (Id. at A.50)

Although police did not read Petitioner Miranda warnings in the precise form in which they appear in that decision, the warnings were a "fully effective equivalent" because they conveyed the essential rights prescribed in Miranda, 384 U.S. at 476. Police specifically advised Petitioner of his right to have counsel present both before and during questioning and, contrary to Petitioner's assertion, the officer's subsequent comment that Petitioner was entitled to counsel if he was "involved" did not negate the warning. See, Duckworth v. Eagan, 492 U.S. 195, 203-205 (1989)(holding that advising an accused that an attorney would be appointed "if and when you go to court" did not render Miranda warnings inadequate where police also advised petitioner of his right to have counsel both before and during questioning.) Likewise, the fact that police interspersed the warnings with explanations thereof did not dilute the warnings. After review of the record, the undersigned concludes that the record supports the Court of Appeals' decision that the warnings which police read to Petitioner before

questioning satisfied Miranda. Petitioner has not established that the State court decision is either contrary to federal law or rests on an unreasonable application of federal law or an unreasonable determination of the facts. See, 28 U.S.C. § 2254(d). Accordingly, his claim based on the Miranda warnings fails.[6]

II. Claim Two: Voluntariness of Petitioner's Confession/Due Process Claim

In his second claim, Petitioner contends that his confession was involuntary under the "totality of the circumstances" test. In response, Respondents argue that Petitioner's voluntariness claims fails because he cannot establish that the state courts' rejection of this claim is contrary to federal law or that it rests on an unreasonable application of federal law or an unreasonable determination of the facts. See, 28 U.S.C. § 2254(d)

In an initial matter, the Court notes that Petitioner contends that his voluntariness claim should not be analyzed under the AEDPA's deferential standard of review. (Supp. Memo. At 22-24[7]). The Court disagrees. Before the AEDPA, federal courts

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[6] In a Supplemental Memorandum (document # 24), Petitioner urges the court to consider an Eleventh Circuit opinion in Hart v. Attorney General of State of Florida, 323 F.3d 884 (11th Cir. 2003). Hart is not binding on this Court because it is neither Supreme Court precedent nor is it the Ninth Circuit's application of such law.

[7] Citations to "Supp. Memo." are to Petitioner's May 19, 2003 Supplemental Memorandum of Law, document # 24.

reviewed de novo a state court's finding that a habeas corpus petitioner's statements were voluntary. Courts, nonetheless, presume correct all underlying historical or subsidiary factual findings. Miller, 474 U.S. at 112-13. Under the AEDPA, however, federal courts must grant substantial deference to a state court's voluntariness determinations. See, Williams, 529 U.S. at 407. Federal courts that have considered this issue have held that state court rulings on voluntariness are entitled to deference under 28 U.S.C. § 2254(d)(1). See, Trice v. Ward, 196 F.3d 1151, 1169 (10th Cir. 1999)(finding that state voluntariness conclusion not contrary to United States Supreme Court precedent); Garvin v. Farmon, 80 F.Supp.2d 1082 (N.D. Cal. 1999)(same). Additionally, in several cases, where lower federal courts have failed to give the proper deference which the AEDPA requires, the Supreme Court has reversed the decision. For example, in Price v. Vincent, ___ U.S. ___, 123 S.Ct. 1848 (2003), he Court stated, with regard to a double jeopardy claim, that, "[a]lthough the Court of Appeals recited the [AEDPA] standard, . . . it proceeded to evaluate the claim de novo rather than through the lens of § 2254(d), apparently because it [viewed the issue] as a question of law and not one of fact." Id. at 1852. The Supreme Court found that contrary to the federal court's conclusion, the state court's decision was not contrary to, or an unreasonable application of, clearly established federal law. Id. at 1854. The Price Court concluded, "[e]ven if we agreed with the Court of Appeals that the Double Jeopardy Clause should be read to prevent continued prosecution of a defendant under these circumstances, it was at least reasonable for the state court to conclude otherwise." Id. at 1854-

1855.

In view of the foregoing, the Court finds that it must apply the AEDPA standard, which is a deferential standard, in analyzing Petitioner's claims. Below, the Court will analyze Petitioner's claims under subsections (d)(1) and (d)(2) of § 2254.

A. "Clearly Established Federal Law" Applicable to Voluntariness Claim

As previously stated, under the AEDPA, a state prisoner is not entitled to habeas relief with respect to any clam that was adjudicated on the merits in state court unless adjudication of the claim:

> (1) resulted in a decision that was *contrary to*, or involved an *unreasonable application of, clearly established Federal law*, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an *unreasonable determination of the facts* in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d)(emphasis added). Before determining whether the state court's decision was "contrary to" or involved an "unreasonable application" of federal law, the Court must identify the clearly established federal law regarding the voluntariness of confessions. See, 28 U.S.C. § 2254(d)(1). As used in § 2254(d)(1), the phrase "Federal law" refers exclusively to United States

Supreme Court precedent. Ramdass v. Angelone, 530 U.S. 156, 165-66 (2000); Williams, 529 U.S. at 403-04. the Court finds that the relevant Supreme Court precedent regarding voluntariness includes the following cases cited by Petitioner and Respondents: Withrow v. Williams, 507 U.S. 680, 688 (1993); Colorado v. Connelly, 479 U.S. 157 (1985), Fare v. Michael C., 442 U.S. 707 (1979); Mincey v. Arizona, 437 U.S. 385 (1978); In re Gault, 387 U.S. 1 (1967); and Gallegos v. Colorado, 370 U.S. 49 (1962). The Court will rely on these cases to set forth the clearly established federal law applicable in this case.

Involuntary confessions are not admissible in evidence. Dickerson v. United States, 530 U.S. 428 (2000)(stating that "we . . . continue to exclude confessions that were involuntary"); Mincey, 437 U.S. at 398. Since Connelly, the Supreme Court has found that coercive police conduct is a necessary prerequisite to a conclusion that a confession is involuntary, and the defendant must establish a causal link between the coercive conduct and the confession. Connelly, 479 U.S. at 165.

To determine whether a confession was involuntary in violation of the due process clause, courts employ the "totality-of-the-circumstances" test. Withrow v. Williams, 507 U.S. 680, 688 (1993).

> Under this approach, [the court] examine[s] the totality of the circumstances to determine whether a confession has been made 'freely, voluntarily and without compulsion or inducement of any sort.'

Withrow, 507 U.S. at 688-89 (quoting Haynes v. Washington, 373 U.S. 503 (1963)).

The "totality of the circumstance" includes "both the characteristics of the accused and the details of the interrogation." Dickerson, 530 U.S. at 434 (quoting Schneckloth v. Bustamante, 412 U.S. 218, 226 (1973)).

With regard to the confessions of minors, the Supreme Court has stated that:

> The greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.

In re Gault, 387 U.S. 1, 55 (1967). However, the Supreme Court has not formulated a specific test for analyzing the confessions of minors. Rather, a juvenile's confession is analyzed under the "totality of the circumstances" where one of the circumstances is the individual's status as a juvenile. United States v. Doe, 155 F.3d 1070, 1073 (9th Cir. 1998)(citing Fare v. Michael C., 442 U.S. 707, 725 (1979)); Gallegos, 370 U.S. at 55 ("There is no guide to the decision of cases [involving the confession of a minor] except the totality of the circumstances."). The totality approach "mandates inquiry into al the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence . . . . " Michael C., 442 U.S. at 725. See, United States v. Haswood, 2003 WL

22833048 (9th Cir., December 1, 2003)(citing Schneckloth v. Bustamante, 412 U.S. 218 (1973))(stating that there is no talismanic definition of voluntariness. Rather, courts consider the following factors: age of the accused, intelligence, advice of constitutional rights, length of interrogation, repeated and prolonged nature of questioning, and the use of physical punishment.)

Having identified the "clearly established federal law," the Court will determine whether the state court decisions are "contrary to" or involve an "unreasonable application" of federal law. See, 28 U.S.C. § 2254(d)(1).

B. Whether State Court Decision is "Contrary to" Federal Law

As an initial matter, Petitioner contends that the state courts reached a conclusion that is "contrary to" clearly established federal law under § 2254(d). A decision is "contrary" to clearly established federal law if (1) it fails to apply the correct controlling authority, or (2) it applies the controlling authority to a case involving facts materially indistinguishable from those in a controlling case, but nonetheless reaches a different result. Bell v. Cone, 535 U.S. 685 (2002).

1. Whether State Court applied Correct Controlling Authority

Petitioner first challenges the standard of review which the State courts applied to Petitioner's case. Petitioner next claims that the state court did

not apply the totality of the circumstances test. The Court will address these claims below.

a. Standard of Review applied by State Court

Petitioner contends that the Arizona Court of Appeals decision is "contrary to" federal law because the state court applied a rule different from the controlling law. Specifically, Petitioner challenges the appellate court's application of the "manifest error" or "abuse of discretion" standards on review of the voluntariness issue. (document # 24, Supp. Memo at 19, 24, 29) Review of Arizona law reveals that these standards are consistent with the controlling federal law.

With regard to these standards, the Arizona Supreme Court has explained that:

> The standard of review on admissibility of a defendant's statements has been deemed *clear and manifest error*. (citation omitted) We find little authority indicating quite how manifest an error must appear to be so clear as to require reversal. We thus find it much more helpful to think in terms of an *abuse of discretion* standard. Abuse of discretion was discussed at length in State v. Chapple. (citation omitted)
>
> '[T]he phrase [abuse of discretion] as a whole has been interpreted to apply where the reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice. Similarly, a discretionary act

> which reaches an end or purpose not justified by, and clearly against, reason and evidence "is an abuse" . . . Something is discretionary because it is based on an assessment of conflicting procedural, factual or equitable consideration which vary from case to case and which can be better determined or resolved by the trial judge, who has a more immediate grasp of all the facts of the case, an opportunity to see the parties, lawyers and witnesses, and who can better assess the impact on what occurs before him. Where a decision is made on that basis, it is truly discretionary and we will not substitute our own judgment for that of the trial judge; we will not second-guess. Where, however, the facts or inferences from them are not in dispute and where there are few or no conflicting procedural, factual or equitable considerations, the resolution of the question is one of law or logic. Then it is our final responsibility to determine the law and policy and it becomes our duty to 'look over the shoulder' of the trial judges and, if appropriate, substitute our judgment for his or hers.' (citation omitted)
>
> Clear and manifest error, whatever it may mean, is really shorthand for abuse of discretion, and that is the term we will use.

State v. Jones, 203 Ariz. 1, 4, 49 P.3d 273 (2002) (emphasis added)(quoting State v. Chapple, 35 Ariz. 281, 297 n. 18, 660 P.2d 1208 (1993)). As the Arizona Supreme Court explained, Arizona's "clear and manifest error" standard of review, which the appellate

court cited in this case, only means that the appellate court defers to the trial court's determination on factual issues. This standard is consistent with the AEDPA.

The following passage also illustrates that Arizona's standard of review regarding the voluntariness issue is consistent with clearly established federal law.

> But where there is a dispute as to whether the acts which are charged to be coercive actually occurred, or where different inferences may be fairly be drawn from admitted facts, the trial judge and the jury are not only in a better position to appraise the truth or falsity of the defendant's assertions from the demeanor of the witnesses but the legal duty is upon them to make the decision. (citation omitted)
>
> Review here deals with circumstances which require examination into the possibility as to whether the judge and jury in the trial court could *reasonably conclude* that the . . . confession was voluntary. The fact that there is evidence which would justify a contrary conclusion is immaterial. To triers of fact is left the determination of the truth or error of the testimony of the prisoners and officials alike.

Lyons v. State of Oklahoma, 322 U.S. 596, 602-03 (1944)(emphasis added). The Supreme Court has further stated that "where a question of fact may have constitutional significance, we normally accord

findings of state courts deference in reviewing constitutional claims here." Time, Inc. v. Firestone, 424 U.S. 448, 463 (1976). Because the standard of review applied by the Arizona appellate court is consistent with federal law, Petitioner's argument that the Arizona Court of Appeals applied an improper standard of review lacks merit.

b. Controlling Authority

Petitioner also contends that the state courts reached a conclusion that is "contrary to" clearly established federal law because the courts applied the incorrect controlling authority. Petitioner challenges the trial court's failure to mention the "totality-of-the-circumstances" test. (document # 24, Supp. App. At 36) the AEDPA, however, does not require citation to Supreme Court precedent – "indeed, it does not even require awareness of [the Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." Packer, 123 S.Ct. at 365. Although the trial court in this case did not explicitly cite the "totality-of-the-circumstances" test, it did cite the proper test under Connelly: "The issue appears to be whether the defendant's will to resist confessing was overborne by the law enforcement officials conducting the investigation." (document # 28, Exh. A at page 33); See, United States v. Miller, 984 F.2d 1028, 1031 (9th Cir. 1993)("The pivotal question in each case is whether the defendant's will was overborne when the defendant confessed.") See also, Amaya-Ruiz v. Stewart, 121 F.3d 486, 494-95 (9th Cir. 1997)(setting forth as the test: "whether, considering the totality of the circumstances, the government

obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne.")

Moreover, the trial court's consideration of various circumstances surrounding Petitioner's confession indicates that the trial court was aware of the "totality-of-the circumstances" test. (document # 28, Exh. A at page 30-33) Specifically, the trial court noted that it had "considered the time, duration, and location of the questioning, the fact that the Miranda warnings were given, and again, the defendant's youth, and inexperience with the criminal justice system." (Id. at 33)

Petitioner contends that the appellate court also failed to rely on the proper controlling authority. The Arizona Court of Appeals' opinion does not cite federal case law, however, it cites to State v. Jiminez, 165 Ariz. 444, 448-453, 799 P.2d 785, 789-90 (1990), an Arizona Supreme Court decision finding the confession of a 17 year old voluntary. (document # 28, Exh. B at 7) Jiminez in turn cites several Supreme Court cases, which this Court identified as the controlling authority in this case, including Connelly, In re Gault, Michael C., and Gallegos. See, 165 Ariz. at 448-453, 799 P.2d at 789-790. The appellate court also stated that, "[i]n assessing the voluntariness of a confession, we 'look to the totality of the circumstances surrounding the confession and determine whether the will of the defendant has been overborne." (document # 28, Exh. B at 7) The Arizona court of Appeals noted that the trial court had considered the factors set forth in Jiminez. (Id. at 8) The court then discussed

Petitioner's age, work experience, education, background, mental condition, capacity to understand the warnings and the consequences of waiving the warnings, and the time and duration of the interrogation. (Id.) Thus, the Arizona Court of Appeals applied the proper controlling authority.

Petitioner further contends that the appellate court failed to conduct in depth review. Contrary to Petitioner's assertion, the Arizona Court of Appeals opinion devotes eight pages to the voluntariness issue. (document # 28, Exh. B at 7-14) The appellate court also noted that it has listened to the audio tapes. (document # 28, Exh. B at 9)

Petitioner next complains that the state courts failed to set forth every factor of the "totality-of-the-circumstances" test in their decisions, and did not stat that they considered the factors individually and cumulatively. (document # 24, Supp. Memo at 29-31) The Supreme Court in Packer, however, said that the state courts do not need to make "a formulary statement that the trial court's actions and inactions were noncoercive "individually and cumulatively." 123 S.Ct. at 365 (discussing state appellate court's discussion of alleged coercion of a dissenting juror.) That the state appellate court considered the totality of the circumstances was "the fair import of the Court of Appeals' opinion." Id.

In view of the foregoing, the Court finds that both the trial court and the appellate court applied the correct "clearly-established federal law." See, 28 U.S.C. § 2254(d).

2. Whether State Court Properly Applied Clearly Established Federal Law

Petitioner next argues that the state court opinion is "contrary to" federal law under § 2254(d)(1) because the state courts applied the controlling authority to a case involving facts materially indistinguishable from those in a controlling case, but nonetheless reached a different result. See, Bell v. Cone, 535 U.S. 685 (2002); § 2254(d).

Specifically, Petitioner argues that his case was materially indistinguishable from Haley v. Ohio, 332 U.S. 596 (1948)(15-year-old's confession obtained after five hours of late night interrogation outside presence of his mother or an attorney was involuntary.); Gallegos v. Colorado, 370 U.S. 49 (1952)(holding 14 year old's confession involuntary and addressing need for friendly adult counsel); and Gault, 387 U.S. at 55, and therefore, the state court should have found Petitioner's confession involuntary.

Contrary to Petitioner's assertion, this case is distinguishable from the foregoing Supreme Court precedent. First, in Haley, the Court found that the confession of a 15-year-old after five hours of interrogation, which began at midnight, by police officers working in relays, without advising petitioner of his rights, and without advice of family or counsel was involuntary in violation of due process. 332 U.S.

at 598-601. Police arrested petitioner from his home in the middle of the night. In finding the confession involuntary, the Court noted that "[a]ge 15 is a tender and difficult age for a boy" and that a "15-year old lad" is in the early teen years." Id. at 599. The Court also found it significant that after petitioner confessed, he was "kept incommunicado for three days during which the lawyer retained to represent him twice tried to see him and twice was refused admission." Id. at 600. Similarly, petitioner's mother was not allowed to see him for over five days after his arrest. Id. The Court found that such behavior evidenced the "disregard of the standards of decency" and went on to state that "[w]hen the police are so unmindful of these basic standards of conduct in their public dealings, their secret treatment of a 15-year old boy behind closed doors in the dead of night becomes darkly suspicious." Id.

Unlike petitioner in Haley, Doody was advised of his Miranda rights, including his right to the presence of a parent or an attorney and he was 17 ½ as opposed to the "tender age" of 15. Additionally, there is no evidence that Petitioner was held "in communicado" after his confession or any other indication that police acted with "disregard of the standards of decency" as in Haley. Although the interrogation spanned the midnight hour, it commenced at 9:00 p.m. and Petitioner voluntarily accompanied police to the station unlike Haley who was taken from his family home in the middle of the night.

This case is also distinguishable from Gallegos where the Court held that the confession of a 14 year

old, who had been held for five days without officers sending for his parents or counsel, and without bringing him before a judge, was obtained in violation of due process. 370 U.S. at 50-55. There, the Court noted that after petitioner was arrested he was detained for five days in Juvenile Hall where he was kept in security. Although his mother tried to see him, she was refused permission. Id. at 50. The court found that "the five-day detention during which time the boy's mother unsuccessfully tried to see him and he was cut off from contact without any lawyer or adult advisor — gives this case an ominous cast." Id. at 54.

Unlike Gallegos, Petitioner was read his Miranda rights and asked whether the wanted a parent present and responded that he was indifferent. Additionally, Petitioner was 17 ½ as opposed to 14. Finally, Petitioner was not detained in "security" or isolated as was petitioner in Gallegos.

Finally, this matter is distinguishable from in re Gault where the confession was obtained without advising petitioner of his right to silence. 387 U.S. at 56. As previously stated, Doody was advised of his Miranda rights.

Finally, this case is distinguishable from Alvarado v. Hickman, 316 F.3d 841 (9th Cir. 2003), *cert. granted*, 2003 WL 21229273 (September 2003). The District Court referred this matter to the undersigned for review in light of Alvarado. Alvarado reaffirms the validity of the totality-of-the-circumstances test and reiterates the factors relevant in assessing the totality of the circumstances where confessions of minors are

concerned. In Alvarado, he court summarized the law as follows:

> Under the Supreme Court's due process jurisprudence, a criminal defendant's age has long been a relevant factor in determining whether a confession or a waiver of a constitutional right was voluntary. See, e.g. Withrow, 507 U.S. at 693, 113 S.Ct. 1745 (noting that a defendant's maturity is one of the factors used to determine if a defendant's confession was voluntary); Michael C., 42 U.S. at 725, 99 S.Ct. 2560 ("Where the age and experience of a juvenile indicate that his request for his probation officer or his parents, is in fact, an invocation of his right to remain silent, the totality approach will allow the court the necessary flexibility to take this into account in making a waiver determination.") Schneckloth, 412 U.S. at 226, 93 S.Ct. 2041 (stating that determination whether consent to search a car was voluntary made is under the totality of the circumstances, including the 'youth of the accused'); In re Gault, 387 U.S. at 45, 87 S.Ct. 1428 ("This court has emphasized that admissions and confessions of juveniles require special caution."); Gallegos, 370 U.S. at 54, 82 S.Ct. 1209 (ruling under the totality of the circumstances that confession of 14-year old to charges of assault 'and robbery could not be 'compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions'); Haley, 332 U.S. at 599-601, 68 S.Ct. 302 (ruling that murder confession

> made by 15 year-old without consultation with counsel or parents 'cannot be judged by the more exacting standards of maturity' and that defendant's due process rights had thus been violated.

Alvarado, 316 F.3d at 848.

The court in Alvarado extended those principles to determine whether petitioner was "in custody." Alvarado was 17 years old when questioned at a sheriff's station for two hours. The court described him as an inexperienced youth with no prior criminal record. His parents were denied permission to be present. 316 F.3d at 844. On habeas review, the Ninth Circuit ruled that this was a custodial interrogation, that defendant's confession should not have been admitted into evidence, and that petitioner's state murder conviction must be vacated. Id.

The Court finds that this case is distinguishable from Alvarado because it involved a determination of whether petitioner was "in custody" which is not before this Court. Rather, the issue before the state court in this case was the voluntariness of Petitioner's confession. Moreover, Alvarado was decided based on an interpretation of the AEDPA set forth in Van Tran v. Lindsey, 212 F.3d 1143 (9th Cir. 2000) which the Supreme Court rejected in Lockyer v. Andrade, 123 S.Ct. 1166 (2003). The Alvarado court's decision on the merits is not binding on this Court's determination of whether Petitioner's confession was voluntary.

In view of the foregoing discussion, the Court

cannot conclude that the state courts reached a decision that is "contrary to" clearly established federal law under § 2254(d).

C. Unreasonable Application of Federal Law

Petitioner further argues that the Arizona Court of Appeals decision involved an unreasonable application of federal law. A court may grant relief under the

> "unreasonable application" clause if the state court correctly identifies the the governing legal principles from our decisions but unreasonably applies it to the facts of the particular case. The focus on the latter inquiry is on whether the state court's application of clearly established federal law is *objectively unreasonable*, and we stressed in Williams that an unreasonable application is different from an incorrect one.

Bell, 122 S.Ct. at 1850 (internal citations omitted) (emphasis added). The federal habeas court may not "substitute its own judgment for that of the state court" and grant habeas relief based solely on an incorrect application of federal law; "[r]ather, that application of law must also be objectively unreasonable." Lockyer v. Andrade, 538 U.S. 63, 123 S.Ct. 1166, 1174 (2003) (stating that the "unreasonable application" clause requires the state court decision to be more than incorrect or erroneous, rather it must be objectively unreasonable.) Woodford v. Visciotti, 537 U.S. 19, 123 S.Ct. 357, 361 (2002)("The federal habeas scheme leaves primary responsibility with the state

courts for these judgments, and authorizes federal-court intervention only when a state-court decision is objectively unreasonable.")

Under the unreasonable application clause, the court must determine whether the state court made and "unreasonable application" of the totality of the circumstances test in determining whether Petitioner's confession was voluntary. The Court notes that "[c]oercive police activity is a necessary predicate to the finding that a confession is not "voluntary" within the meaning of the Due Process Clause of the Fourteenth Amendment." Colorado v. Connelly, 479 U.S. 157, 167 (1986). Absent a causel connection between coercive police conduct and the confession, no due process violation exists. Id. at 164. Thus, the court must consider the crucial elements of police misconduct in addition to the following factors that are part of the "totality-of-the-circumstances" test: "the length of the interrogation . . ., its location, . . . its continuity, . . . the defendant's maturity, . . . education, . . . physical condition, . . . and mental health." Withrow, 507 U.S. at 693 (citations omitted.) Although lack of parental notice is another factor to consider in the totality of the circumstances, due process does not require such notice. United States v. Doe, 155 F.3d 1070, 1073 (9th Cir. 1998). Under Connelly, "personal characteristics of the defendant are constitutionally irrelevant absent proof of coercion." United States v. Rohrbach, 813 F.2d 142, 144 (8th Cir. 1987). Thus, unless the trial court found coercive police conduct, specific factors such as Petitioner's age, mental capacity, cultural background, education are irrelevant. See, Derrick v. Petereson, 924 F.2d 813, 818 (9th Cir.1991).

In challenging the voluntariness of his confession, Petitioner cites the following factors including: (1) his age, cultural background, and education, (2) the lack of parental notice, (3) the length and location of the interrogation, and the lack of food during the interrogation, and (4) the interrogation techniques. The Court will consider these factors in analyzing whether the state court reasonably applied the clearly established federal law to Petitioner's claims.

1. Petitioner's Age

Petitioner contends that the State unreasonably applied the totality of the circumstances test federal law because his age renders his confession involuntary. The appellate court noted that Petitioner was 17 ½ at the time of the interrogation. (document # 28, Exh. B at 8) Petitioner contends that the appellate court misstated Petitioner's age. The record reflects that Petitioner was born on May 9, 1974. (document #28, Exh. C at 6-7) Thus, at the time of the interrogation, he was 17 years, five months and 16 days old. The Court finds that the fourteen day difference in Petitioner's actual age and the appellate court's characterization does not render the appellate court's determination unreasonable. While Petitioner's age is a factor to consider in the totality of the circumstances, the appellate court considered this factor.

2. Petitioner's Cultural Background

Petitioner argues that although he was

seventeen, he was "not a typical, savvy American teenager," but had spent the first eight years of his life in Thailand, was unable to clearly express himself in English, and was deferential to authority due to his Thai upbringing. (document # 2 at 30-31) Thus, Petitioner argues that the state courts failed to give appropriate weight to his cultural background in assessing the voluntariness of his statement.

Respondents state that evidence presented during sentencing showed that Petitioner has spent the first five years of his life in rural Korat Province, Thailand. (S 1/18/94; 177-86) When Petitioner was five, his father died. (Id. at 180-81) Petitioner's mother left Thailand less than a month later, leaving Petitioner with an aunt who lived outside of Bangkok. (Id. at 181, 183-86) Petitioner and his mother had no contact for three years. (Id. at 186) Petitioner's mother later married Brian Doody, an American serviceman, while living in Germany. (Id. at 187, 195-96) The couple later returned to Thailand, and then took Petitioner to Germany. (Id. at 196-98) They lived in Germany for the next year and a half. (Id. at 202, 207-08, 210) Brian Doody was transferred to Georgia in 1984, where he adopted Petitioner. (Id. at 209-10) Brian Doody was sent to Korea but Petitioner and his mother stayed in Georgia. (Id. at 210, 1/21/94; 28) A year later, Brian was transferred to Guam and was joined by his family. (1/24/94; 29) In 1989, Brian Doody was transferred to Luke Air Force base in Arizona, where he was living with his family at the time of the Temple incident. (1/28/94; 210. 1/21/94; 15, 29)

Some of these facts were presented during the voluntariness hearing. There, Detective Sinsabaugh testified that the Task Force knew that Petitioner was "of Thai descent." (document # 7, Exh. D at 58) During an interview with Sinsabaugh at Luke Air Force base on September 10 1991, Petitioner stated that he was born in Thailand and came to the United States with his mother and stepfather, who was in the United States Air Force. (Id. at 62) Sinsabaugh also knew that Petitioner's mother and brother were Buddhists. Thus, the record of the voluntariness hearing shows that the interrogators knew that Petitioner was born in Thailand, his cultural background was Thai and Buddhist, that he was not living with his biological father, and that he was part of a military family.

Essentially, Petitioner argues that due to his Thai background, he was deferential to authority and had difficulty communicating in English. The record indicates that although Petitioner was soft spoken, he could clearly communicate in English and did not appear to have difficulty conversing with the officers. (See document # 28, Exh. C at 46) Indeed, Petitioner told the officers that he only understood a "little bit" of the Thai language. (Id.)

Moreover, Petitioner's respect for authority, which derived from his Thai background, does not render his confession involuntary. See Liu v. State of Delaware, 628 A.2d 1376, 1380-1381 (Del. 1993) (holding that totality of circumstances indicated that defendant's decision to waive his Miranda rights was not compelled by his Chinese heritage and noting that although cultural heritage is relevant in assessing the

totality of the circumstances, police officers must not be required to "anticipate the frailties or idiosyncracies of every person whom they question."); United States v. Yunis 859 F.2d 953, 962-66 (D.C. Cir. 1988)(holding that Lebanese national's seasickness, uncomfortably hot room, and lack of familiarity with American legal culture did not render waiver of his Miranda rights involuntary.) In view of the facts before the state court at the suppression hearing, the court did not make an unreasonable application of law regarding Petitioner's cultural background.

3. Education.

Petitioner contends that his level of education supports a finding that his confession was involuntary. Petitioner argues that because the voluntariness record discloses nothing about Petitioner's education in any prior year, including whether he had learned to read English, the court cannot conclude that placement in eleventh grade was a reflection of his academic level. Petitioner goes on to speculate that in view of Petitioner's early years in Thailand, his relocation to Georgia, Guam and then to Arizona, it is unlikely that Petitioner had achieved an eleventh grade academic level. The Court finds that although Petitioner's speculation is interesting, it does not render the appellate court's determination that Petitioner's education did not suggest that his confession was involuntary unreasonable in view of the evidence presented.

At the voluntariness hearing, Riley testified that Petitioner "indicated that he was or had an overall B

average in school," (document # 7, Exh. B at 80-81). The tapes and the transcript of the interview indicate that had received "about a B A average." (document # 24, Supp. App. 50; cassette tape # 1)

With regard to Petitioner's intelligence, Sinsabaugh testified that he thought Petitioner was intelligent because during their interview on September 10, 1992, Petitioner had expressed an interest in becoming a pilot. (document # 7, Exh. D at 61 "he appeared real intelligent [based on] his goals.") Petitioner also expressed an interest in attending college. (document # 7, Exh. M, Tape 2 at 18)

In view of the evidence that Petitioner was in eleventh grade, have received a "B A average" on his last report card, and expressed an interest in college and pursuing a career, the appellate court reasonably concluded that Petitioner had a B average, was "completing" eleventh grade, and was "educated." The state court's analysis of Petitioner's education as part of the totality of the circumstances test was not objectively unreasonable.

4. Maturity Level

Petitioner also contends that the record contains little information regarding his maturity level. Petitioner told police that he participated in the R.O.T.C. Honor Guard and the R.O.T.C. Color guard, had worked at McDonald's in the past, and was presently employed at the commissary at Luke Air Force Base. (document # 7, Exh. B at 80-85) Petitioner contends that absent greater detail, such as

the length of Petitioner's employment and his performance in these various job and activities, Petitioner's employment and ROTC participation indicates little about Petitioner's maturity level. The Court disagrees.

As the appellate court noted, Petitioner was in high school honor guard and color guard for the R.O.T.C. (document # 28, Exh. B at 8) Petitioner told detectives that he had been a ROTC member for three years, and that he was "in charge" of the Color Guard and Honor Guard. (document # 28, Exh. C at 5-6; document # 7, RT 11/9/92 p.m. at 19) In addition, Petitioner had been a member of the Civil Air Patrol. (document # 7, Exh. M, Tape 2 at 20)

The evidence also established that Petitioner had worked at McDonald's and the Luke Air Force Base Commissary. (document # 7, Exh. V at 80-81; document # 28, Exh.C at 19-20, 29, 38-40, 42-44; document # 7, Exh. M, Tape 2 at 4, 7) Petitioner also told Detective Sinsabaugh that in addition to working at the commissary, he worked at Anthony's Pizza located on the Base. (document # 7, Exh. D at 63) The Court finds that based on this employment history and activities, the appellate court reasonably concluded that Petitioner was a mature 17 year old.

Additionally, other evidence supports a finding that Petitioner was a mature high school student. Petitioner was the oldest of four children. (document # 28, Exh. C at 41-42) Petitioner moved out of the house and into an apartment with Myers and Caratachea, and Petitioner signed the apartment lease. (document

28, Exh. C at 7, 15-18, 20-26, 31, 34, 36; Exh. A at 33, 62; Exh. D at 82; Exh. G at 21; Exh. I at 97-98; Exh. M, Tape 5 at 5-6, 9, 12-13) Based on the foregoing, the state court made a reasonable application of the totality of the circumstances test in considering Petitioner's maturity level.

5. Experience with Law Enforcement

Petitioner also contends that the state court failed to consider his lack of prior criminal history or experience with the criminal justice system. Contrary to this assertion, the state court specifically considered Petitioner's lack of experience with law enforcement. (document # 28, Exh. A at page 33)

In Villafuerte, 75 F.3d at 1365-66, the court rejected a claim that defendant was uneducated and lacked experience with police. Several days before the interrogation that gave rise to the confession, Petitioner had been questioned by Detective Sinsabaugh. The Court finds that the state court properly considered Petitioner's lack of experience with law enforcement. Although Petitioner had limited exposure to the police, the appellate court reasonably concluded that this factor does not render his confession involuntary.

6. Lack of Parental Notice

Petitioner further argues that his confession was involuntary because police took "extraordinary [] steps to insure that [Petitioner's] father would learn nothing about the interrogation and would not come to the

Task Force offices to provide a source of support or advice for his son." (document # 2 at 31) Petitioner presented this claim to the Court of Appeals which rejected it based on Petitioner's age and his "specific consent to speak with the officers without his parents." (document # 2 at A.11) The Court of Appeals noted that "a parent's absence itself does not, in itself, render a confession involuntary" and that the "absence of a parent weighs less heavily when, as here, the juvenile has not requested" one's parents. (document # 24, Supp. App. 10) The record establishes that the Court of Appeals did not make an unreasonable determination of the facts in view of the evidence.

Although lack of parental notice is another factor to consider in the totality of the circumstances, due process does not require parental notification. United States v. Doe, 155 F.3d 1070, 1073 (9th Cir. 1998)(finding juvenile's confession voluntary despite lack of parental notification where he never requested that police notify his parents.); Derrick v Peterson, 924 F.2d 813, 819 (9th Cir. 1990)(finding juvenile's confession where petitioner never requested that his parents be notified and noting that no authority mandates parental notice.). See, Haley v. Ohio, 332 U.S. at 600 (stressing a minor's need for "counsel and support if he is not become the victim first of fear, then panic" during interrogation).

Here, before interviewing Petitioner, an officer asked Petitioner if he "would want to have your parent or guardian present during our conversation with you now." (document # 28, Exh. B at 11) Petitioner responded, "It doesn't' matter." (Id.) The officer

clarified, "It doesn't matter? (Id.) And Petitioner replied, "Uh-huh." (Id.) On the Miranda warnings form, Petitioner initialed "no" stating that he did not want his parent or guardian present during the interview. (document # 28, Exh. C and D) Petitioner now asserts that he never rejected the presence of a parent. The record does not support this claim.

Petitioner also asserts that the police took extraordinary measures to ensure that his step-father would not be present when Petitioner was questioned. During the relevant period, Petitioner was living in Arizona with Alex Garcia and his family and Petitioner's mother and step-father were living in Colorado. (document # 7, Exh. A at 82, 138) During the investigation of the Temple Murders, police decided that they wanted to question petitioner's step-father and brother who were living in Colorado at the time. (Document # 7, Exh. D at 68, I at 94, J at 36) On October 16, 1991, a detective interviewed them over the phone. (document # 7, Exh. D at 69, 139; Exh I at 94) Detective Sinsabaugh wanted to meet Brian and David in person, in particular so that David could identify property that police had recovered which might have been taken from the Temple and so that David could advise them about life at the Temple. (documents # 7 Exh. B at 14-15; Exh. C at 75; Exh. D at 73; Exh. J at 43) Thus, Detective Sinsabaugh obtained permission to pay for Brian and David to fly to Arizona. (document # 7, Exh. D at 0-0, 139; Exh. I at 95, J at 37-38) Lieutenant Heath was in charge of travel arrangements. (document # 7, Exh. I at 95) Later, Brian told Sinsabaugh that he wanted to drive. Sinsabaugh responded that the department would pay

for gas, food, and lodging for one night. (document # 7, Exh. B at 119; Exh. D at 70, 140; Exh. J at 51, Exh. K at 31) They agreed that Brian would be paid for his expenses before he left Colorado. (document # 7, Exh. D at 142)

Police interviewed Brian and David on October 24, 1991 as planned. (document # 7, Exh. B at 112-14, 117-18; Exh. C at 75) The interview lasted 1-2 hours. (document # 7, Exh. A at 137, Exh. D at 83) After the interview, police requested the phone number where they could reach Brian after he left the hotel but before he returned to Colorado. (document # 7, Exh. B at 120-21, 127) Brian declined to give police that information. (Id.) Detective Sinsabaugh arranged to meet Brian for lunch the next day. (document # 7, Exh. B at 121, Exh. C at 69) Brian came to the station on October 25, but Sinsabaugh cancelled lunch because the investigation had gotten busy because the murder weapon had been found. (document # 7, Exh. B at 126-27, J at 52-53)

The officers subsequently had a briefing and decided that they wanted to speak with Petitioner, Garcia, and Mike Myers, (document # 7, Exh. I at 98) The officers did not further discuss Brian Doody. (document # 7, Exh. B at 123, 148) Police did not arrange to "get rid" of Brian. (document # 7, Exh. B at 148; Exh. B at 41) Rather, Brian's trip had been pre-arranged and he was scheduled to return to Colorado after his 2-day stay in Phoenix.

The record does not support Petitioner's claim that police deliberately sent his step-father away so that he would not be present during the interview.

First, Brian Doody was living in Colorado. Brian would not have even been in Phoenix unless police had requested to interview him and paid his way. The detectives who interviewed Petitioner were not involved with Brian Doody's visit. (document # 7, Exh. A at 143-44) Petitioner was no longer living with his family but had lived in an apartment and then moved in with Alex Garcia and his family. (document # 7, Exh. A at 138)

Unlike Alvarado, where petitioner's parents accompanied him to the station but were refused permission to be present, 316 F.3d at 844, Petitioner did not request his parents' presence despite being advised that he could have them present. In contrast, the police in Alvarado never advised petitioner of his Miranda rights. 316 F.3d at 844, 854.

Petitioner misstates the record in stating that the appellate court found that police took "extraordinary steps. . . to ensure that Petitioner's father could not be available . . ." (Supp. Memo at 21) The appellate court did not expressly comment on this issue, rather it stated that "whether the state acted to prevent Doody's father from attending the interrogation could not have affected the voluntariness of Doody's statements," in view of Doody's age and his consent to speak with the police without his parents. (document # 28, Exh. B at 10, n. 5) The Court finds that the appellate court's findings regarding the parental notice issue are reasonable in view of the evidence. See, Moran v. Burbine, 475 U.S. 412 (1986)(failure of police to inform arrested suspect of the presence of a lawyer whom his sisters had hired

unbeknownst to the suspect did not render suspect's confession inadmissible because event unknown to suspect can have no bearing on his capacity to waive rights.

7. Length and Location of Interrogation, and Lack of Food during Interrogation

Petitioner argues that the following factors render his confession involuntary: (1) length of the interrogation, which began at 11:00 p.m. and continued uninterrupted for nearly thirteen hours, (2) the location of the interrogation which took place in a small room with no furniture except "armless chairs," and (3) the fact that although Petitioner was given the opportunity to request food, he did not receive any. (document # 2 at 32-33) Petitioner presented these arguments to the Court of Appeals which rejected them based on other evidence which the court found indicated that Petitioner voluntarily confessed. (document # 2 at A.8 – A.9) As discussed below, the Court of Appeals' decision is a reasonable application of the law.

Although the length of interrogation is relevant to determining whether a suspect confessed voluntarily, length alone does not establish that police overcame a suspect's will. See, United States v. Haswood, 2003 WL 22833048 (9th Cir, December 1, 2003)(stating that even assuming interrogation lasted "all day," coercion typically involves far more outrageous conduct.)(citing Mincey v. Arizona, 437 U.S. 385, 398-99 (1978)). Rather, in addition to the length of the interrogation, the Supreme Court relies on

factors including the suspect's opportunity to rest, the point during the interrogation when the suspect confesses, and the suspect's mental ability in determining whether a confession is involuntary. See, Mince v. Arizona, 437 U.S. 385, 398-99 (1978)(finding statement involuntary where obtained from defendant who was in hospital, in near coma, and in great pain while fastened to tubes, needles, and breathing apparatus); Ashcraft v. State of Tennessee, 322 U.S. 143, 155 (1944)(finding confession involuntary where police questioned defendant for thirty-six hours during which he was held incommunicado, without sleep or rest, and relays of investigators and lawyers questioned defendant who denied involvement in his wife's murder for nearly the entire 36-hour period); Haley v. Ohio, 332 U.S. 596, 598-601(1947)(finding fifteen year old's confession involuntary where he confessed after five hours of interrogation starting at midnight, where police worked in relays without warning him of his rights, and without benefit of counsel or his family, and noting that after defendant confessed, he was kept incommunicado for three days during which time police refused to permit the lawyer retained to see defendant); Reck v. Pate, 367 U.S. 433, 435-442 (1961)(holding that confession of nineteen year old was inadmissible where he was mentally retarded, was interrogated in six to seven hour blocks during an eighty-hour period by teams of interrogators, was without adequate food, without counsel and assistance of family or friends, was hospitalized for a brief period due to physical ailments, and was in intense pain following release from the hospital.); Blackburn v. Alabama, 361 U.S. 199, 204-05 (1960)(holding that confession was involuntary where defendant had a

long history of mental illness and was insane at the time of the confession, and was questioned for eight or nine hours in closely confined quarters by as many as three officers at a time.)

In this case, Petitioner voluntarily accompanied police to the station at approximately 9:00 p.m. After being read his Miranda rights and agreeing to talk with police without a parent present, Petitioner was questioned for nearly thirteen hours. After three hours of questioning Petitioner admitted that he had borrowed the Marlin rifle used in the murders. (cassette tapes # 4-5). Then, approximately seven hours into the interrogation, Petitioner admitted that he helped plan and participated in the Temple incident. (cassette tape # 10) Significantly, Petitioner then described the events at the Temple in a detailed, narrative fashion which spanned several hours. (cassette tapes # 10-14) Despite the length of the interrogation, Petitioner admitted involvement rather early on and when he did confess, his statement was detailed and lengthy. Thus, the Court finds that the length of the interrogation does not render the confession involuntary.

The Court also finds that the appellate court reasonably concluded that the location of Petitioner's interrogation did not render the confession involuntary. Although Petitioner's interrogation was conducted in a small room, the record does not contain evidence that the conditions contributed to Petitioner's confession. But see, 361 U.S. 199, 204-05 (1960)(finding confession involuntary where in addition to taking place in a room about four by six feet,

defendant was insane at the time of the confession, as many as three officers were present at once, the interrogation lasted nine hours, and the deputy sheriff composed the written confession); Reck, 367 U.S. at 442-43 (finding confession involuntary where defendant was shuttled between several police stations and interrogation rooms, was placed on public exhibition in "show ups," was without adequate food for several days, was hospitalized for stomach problems, and was of subnormal intelligence.); Clewis v. State of Texas, 386 U.S. 707, 709-11 (1967)(holding that confession was involuntary where defendant, who had a fifth grade education, was interrogated over a nine-day period, was never fully advised of his right to counsel, gave his first statement after he had been in custody for 38 hours, had little food or sleep and appeared sick, his confession was inconsistent with the facts of the shooting, and he was interrogated in several buildings and was taken to the grave site and to another town.)

Additionally, the fact that Petitioner did not receive any food during the interrogation does not render his confession involuntary. Several times during the interrogation, police officers offered Petitioner beverages or food. (cassette tapes # 3, # 5, and # 10). Petitioner received three drinks during his interrogation but never requested food. Although Petitioner's interrogation lasted thirteen hours, there is no evidence that the lack of food contributed to his confession. But see, Reck, 367 U.S. at 441-43 (finding confession involuntary where defendant was without solid food for several days); Clewis, 386 U.S. at 709-711 (finding confession involuntary where, *inter alia*,

defendant had very little food during a nine-day period); Greenwald v. Wisconsin, 390 U.S. 519, 520-21 (1968)(finding confession involuntary where petitioner, who suffered from high blood pressure, was not offered food until after he had signed a written confession, twelve hours after interrogation commenced, and where petitioner's request for an attorney was ignored.)

8. Interviewing Techniques/Coercive Conduct

Petitioner next argues that the state court unreasonably applied federal law in finding that the interrogation techniques did not amount to coercive conduct. Petitioner claims that the interrogation techniques "were designed to put tremendous psychological pressure on the youth." (document # 2 at 33) The techniques Petitioner challenges include: (1) commiserating with Petitioner; (2) relentlessly questioning Petitioner even when he was silent; (3) pleading with Petitioner to provide information; (4) lying to Petitioner about what the police knew; (5) trying to convince Petitioner that telling police what he knew was in his best interest, (6) telling Petitioner that what he said would stay inside the interrogation room and would not be shared with the other suspects, (7) appealing to Petitioner's sense of honor and duty, and encouraging him to "join [their] team," and (8) exploiting Petitioner's hopes to return to a normal life. (document # 2 at 33-36) The state court rejected Petitioner's argument that he was unfairly pressured to confess, though the court recognized that the officers "used a variety of approaches," including an appeal to his "sense of duty," and that he was encouraged to

trust and confide in his interrogators. (document # 24, Supp. App. 12) The appellate court agreed with the trial court that portions of the interrogation were "aggressive, energetic, and forceful," but found that the interrogation was "permissible, i.e. lawful." The court also recognized that Petitioner "did not speak for long periods during the interrogation," but stated that he did not "invoke his right to remain silent or to an attorney." The court characterized his interrogators' tactics as "deceptive, in part," but not "so egregious" as to overcome his will. (document # 24, Supp. App. 13) The Court finds that the appellate court's analysis constitutes a reasonable application of federal law as discussed below.

Police efforts to create an atmosphere conducive to confessing alone do not violate the due process clause. See, Amaya-Ruiz v. Stewart, 121 F.3d 486, 494-95 (9th Cir. 1997)(stating that encouraging defendant to tell the truth did not constitute coercive conduct); United States v. Miller, 984 F.2d 1028, 1031-31 (9th Cir. 1993)(stating that neither "mere emotionalism and confusion," nor mere "deception" renders a confession involuntary)(citing Frazier v. Cupp, 394 U.S. 731, 737-39 (1969)). Rather, the central issue is whether the "defendant's will was overborne when the defendant confessed." Miller, 984 F.2d at 1031 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 225-26 (1973)). Additionally, although the Supreme Court recognizes that statements obtained by a promise are involuntary, this broad rule does not "invalidate, per se, all statements made by a suspect in response to a promise made by law enforcement personnel." United States v. Guerrero, 847 F.2d 1363,

1366 (9th Cir. 1988)(stating that statements by an interrogator do not render a confession involuntary "even when its accompanied by a promise to recommend leniency or by speculation that cooperation will have a positive effect.") Rather, "[t]he promise must be sufficiently compelling to overbear the suspect's will in light of the attendant circumstances." 847 F.2d at 1366. (holding that confession was voluntary despite the following circumstances (1) police denied defendant's request to postpone the interrogation by one day, (2) police used the "good guy, bad guy" technique, (3) one interrogator falsely told defendant that his codefendant had confessed, (4) the United States Attorney promised to get defendant psychiatric help, and (5) the United States Attorney told defendant that a confession might help him during sentencing and advised him that "only the truth can help you.") See also, United States v. Wolf, 813 F.2d 970, 972-75 (9th Cir. 1987)(finding confession voluntary notwithstanding claim that Mexican authorities threatened him and that an interrogator expressed disbelief at the defendant's statement to elicit further information from him). No due process violation occurs where authorities do not promise any "tangible benefit." Guerrero, 847 F.2d at 1367 (noting that the prosecutor did not promise defendant any tangible benefit, such as reduced charges or a recommendation of a lenient sentence.)

Moreover, exaggerating the evidence against the suspect and encouraging the suspect to confess do not necessarily render a confession involuntary. See, Amaya-Ruiz, 121 F.3d at 495 (stating that officers' misrepresentation that a witness has seen the

defendant did not constitute coercion); Miller v. Fenton, 796 F.2d 598 (3d Cir. 1986), on remand from, Miller v. Fenton, 474 U.S. 104 (1985)(holding that confession was voluntary despite fact that interrogators sympathized with accused and encouraged him to "unburden himself" and confess to murder, and lied to defendant regarding evidence in the case.) In this case the interrogators' appeal to Petitioner's sense of honor based on his participation in the R.O.T.C. did not violate the due process clause. See, United States v. Miller, 984 F.2d 1028, 1031-32 (9th Cir. 1993)(finding confession of Mormon suspect voluntary despite appeal to his religious beliefs by special agent who was also a bishop in the Mormon church.)

After reviewing the record in this matter, including the audio cassette tapes of Petitioner's interrogation, in view of the foregoing principles, the Court concludes that Petitioner's confession was voluntary and that no due process violation occurred n obtaining that confession. Although Petitioner did not speak for several long periods during the interrogation, he never invoked his right to remain silent or his right to counsel. Interrogators never promised Petitioner any tangible benefit in exchange for his confession. Rather, officers merely stated that what Petitioner said would not leave the interrogation room. While such a tactic is deceptive, it does not rise to the level of a due process violation.

Additionally, the following factors indicate that Petitioner's will was not overborne and that his confession was voluntary. First, after approximately

three hours of questioning, Petitioner admitted that before the Temple Murders, he had borrowed the Marlin rifle used in the murders. (cassette tapes # 4-5). Petitioner admitted that he helped plan and participated in the temple robbery after approximately seven hours of questioning. (cassette tape #10) But see, Ashcraft, 322 U.S. 155 (finding confession involuntary where defendant confessed at the end of 36 hours of interrogation). Significantly, following his admission, he described the events in a detailed, narrative fashion which spanned several hours. (cassette tapes # 10-14) But see, Blackburn, 361 U.S. at 204-05 (finding confession involuntary where deputy sheriff composed the written confession); Spano v. New York, 360 U.S. 315, 318-22 (1959)(finding confession involuntary where (1) police ignored defendant's repeated requests to contact retained counsel, (2) a friend of defendant's who was a police officer questioned defendant and falsely told him that defendant had gotten him into trouble, and (3) defendant had a history of mental illness and did not make a narrative statement but responded to leading questions in a question-and-answer confession.) Based on the foregoing, the Court concludes that the State Court's decision that Petitioner voluntarily confessed rests on a reasonable application of federal law and a reasonable determination of the facts. Petitioner's voluntariness claim, therefore, fails.

D. State Court's Determination of the Facts

Petitioner also contends that the state court decision rests on an unreasonable determination of the facts under 2254(d)(2). In support of that claim,

Petitioner challenges the following factual findings: (1) Petitioner remained "alert" and "responsive" throughout the interview; (2) Petitioner was "completing" his junior year and maintained a "B" average; (3) Petitioner was fluent in English; and (4) police did not make promises to Petitioner.

1. Petitioner remained alert.

Petitioner contends that the state court made an unreasonable determination of the facts in concluding that Petitioner remained alert during the interrogation. The Supreme Court has stated that "factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, 28 U.S.C. § 2254(c)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on actual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding . . . ." Miller El v. Cockrel, ___U.S.___, 123 S.Ct. 1029, 1041 (2003); See Torres v. Prunty, 223 F.3d 1103, 1108 (9th Cir. 2000)(stating that the standards governing reasonableness under § 2254(d)(2) are the same for reasonableness under § 2254(d)(1)). The Court finds that the Court of Appeals' conclusion that Petitioner remained alert and attentive throughout the course of the interrogation is not an unreasonable determination of the facts in view of the evidence presented.

Riley testified that during the drive to the Task Force, Petitioner appeared "very alert," "polite, attentive, and just overall pleasant." (document # 7, Exh. B at 68-69) Riley also testified that, when the 13-

hour interview began, Petitioner's posture was good and that he maintained eye contact. (document # 7, Exh. B at 101) There is also evidence that over time Petitioner became "less attentive." (Id.) "His responses were much more quiet and non-direct . . . . {E}ye contact was not there." (Id. at 101-02). However, when Riley, who was in the interrogation room until almost 5:00 a.m., was asked whether Petitioner appeared tired at anytime during the interview, Riley testified that, "I'd have to say for the most part no. He didn't really display any real overt sign of being fatigued or tired." (document # 7, Exh B at 89, 106-07, Exh. C at 47) Also, Detective Sinsabaugh testified that when he first entered the interrogation room at 2:45 a.m., Petitioner was "very erect, had a military bearing, and he appeared alert." (document #7, Exh. D at 101) Captain White testified that when he entered the room to join the interrogation at approximately 5:55 in the morning, "Jonathan was sitting upright in a chair...almost at attention when I first came in." (RT 11/10/92:83) White testified that Petitioner understood questions and gave appropriate answer and did not indicate "that he was too tired or sleepy to talk." (RT 11/10/92:83-84)

Petitioner also contends that, contrary to the appellate court's finding, the evidence shows that he was not responsive during the entire interrogation. Indeed, there are portions of the audiotapes of the interrogation where Petitioner is silent. However, Petitioner did not request any breaks in the interrogation and never requested a parent or counsel. Once Petitioner was ready to talk, he gave a description of events at the Temple which spanned

several hours.

Petitioner contends that the record does not support a conclusion that Petitioner was alert and attentive throughout the interrogation. Although fact finds reviewing the foregoing evidence could reach different conclusions regarding whether Petitioner remained alert and responsive during the entire interview, the Court of Appeals' determination that Petitioner remained "responsive" throughout the interview is not objectively unreasonable in view of the evidence submitted.

2. Completing Junior Year and Maintained "B" Average

Petitioner further challenges the appellate court's conclusion that he was "completing" his junior year in high school. During the relevant period, Petitioner was in the fall of his junior year of high school. The appellate court's use of the word "completing" is not an objectively unreasonable determination of the facts. Although Petitioner had technically only been in school for a few months at the time of the interrogation, he was certainly in the process of completing his junior year.

Petitioner next argues that the notion that Petitioner maintained a "B average" is unsupported. Again, Petitioner appears to be splitting hairs to find fault with the appellate court's factual determinations. Petitioner testified that on his most recent report card, he had received a "B A average." (document # 24, Supp. App. At 50) Petitioner was unable to provide

specific information regarding his grades for the fall of his junior year because report cards had not yet been issued. Thus, Petitioner's statement to police was based on the most recent information regarding Petitioner's grades. The appellate court's conclusion that Petitioner maintained a B average was reasonable based on the evidence presented.

3. Fluency in English

Petitioner also argues that the determination that Petitioner spoke "fluent" English is belied by the audiotapes and the transcript of the interrogation. The appellate court's determination regarding Petitioner's English proficiency was based on the audiotapes of the interrogation. The appellate court found that Petitioner "spoke fluent, although lightly accented, English." (Exh. A to document # 28) This finding is reasonable in view of the evidence presented. Petitioner informed the police of his Thai background however, he also told police that he could only speak "a little bit" of the Thai language. (Exh. C to document # 28 at 46) Petitioner stated that "I can get along with them, it's just that I can't communicate that well with them." (Id.) Additionally, when asked about a Thai individual at the Temple, Petitioner stated that he could barely understand him because that individual spoke Thai and his English was not very good. (document # 7, Exh. M, tape 2 at 2) The evidence before the appellate court indicates that Petitioner's primary language was English. Thus, the determination that Petitioner spoke fluent English was not an unreasonable determination of the facts.

4. Promises Made to Petitioner

The Court of Appeals also rejected Petitioner's argument that the officer's promises that Petitioner's statements would not leave the room was a promise that affected the voluntariness of the statement. In so ruling, the court wrote that the officers assured Petitioner that his words would not be disclosed to other suspects, they did not imply that his statements would not be used against him, and that, in any event, he did not establish that he relied on the statements in confessing. (document # 24, Supp. App. at 12) Petitioner contends that the Court of Appeals' determination that no promises were made to Petitioner (document # 24, Supp. App. At 11-12) is also unreasonable in view of the evidence. Petitioner's challenge to the foregoing techniques on direct appeal failed. Specifically, with respect to Petitioner's claim that police officers elicited his confession by promising not to disclose his statements to the other suspects, the Court of Appeals found that Petitioner's claim failed because the officers did not "promise" or "offer any benefit to [Petitioner] in exchange for information." (document # 2 at A.11) The Court of Appeals further found that Petitioner did not establish that he relied on the police officers' statements in confessing. (Id. at A.12) Interrogators never promised Petitioner any tangible benefit in exchange for his confession. Rather, officers merely stated that what Petitioner said would not leave the interrogation room. While such a tactic is deceptive, it does not rise to the level of a due process violation.

In view of the foregoing, the Court finds that

Petitioner fails to establish that the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or . . . was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). Accordingly, his due process claim fails.

III. Violation of Due Process Clause and Crane v. Kentucky[5]

Finally, Petitioner argues that his conviction violates the Constitution because the trial court prohibited him from arguing to the jury that, in considering the veracity of Petitioner's confession, the jury should consider the confessions of the Tucson Four which the State itself claimed were false. In support of this claim, Petitioner relies on Crane v. Kentucky, 476 U.S. 683 (1983), for the proposition that "a defendant has a fundamental constitutional right . . . to present evidence casting doubt on the credibility of a confession . . . and to argue to the jury that he is innocent notwithstanding his admission of guilt." (document # 2 at 44)

In Crane, the trial court initially denied defendant's motion to suppress his confession after determining that the confession was voluntary. Thereafter, the court precluded defendant from arguing to the jury that the "very circumstances

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[5] 476 U.S. 683 (1986)

surrounding the giving of the confession are enough to cast doubt on its credibility [because] evidence bearing on the length of the interrogation and the manner in which it was conducted would show that the statement was unworthy of belief." Crane, 476 U.S. at 685. On review, the Supreme Court held that "regardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, an entirely independent question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility." Id. at 689. The Court held that the right to present a complete defense and the opportunity to be heard would prove empty if the State could exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. "In the absence of any valid state justification," the Court concluded, "exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing crucible of meaningful adversarial testing." 476 U.S. at 690-91 (internal quotations marks omitted.)

Contrary to Petitioner's assertion, Crane does not mandate that the trial court admit evidence of interrogations other than that of the defendant. See United States v. Sitton, 968 F.2d 947, 958 (9th Cir. 1992)(stating that Crane did not require district court to admit evidence of defendant's previous encounter with police because it was not relevant to establish the reliability of his statements to police nearly three

weeks later); Stano v. Dugger, 883 F.2d 900, 908-09 (11th Cir. 1989), remanded on other grounds, 901 F.2d 898 (11th Cir. 1989)(affirming the trial court's exclusion of evidence that defendant falsely confessed to other murders which he did not commit or for which he was not charged, and expert testimony that mentally ill people often confess to crimes they did not commit); compare, La Grand v. Stewart, 133 F.3d 1253, 1267 (9th Cir. 1998)(rejecting petitioner's claim that he was denied right to present a complete defense under Crane where the court excluded a codefendant's confession as unreliable.) Although Crane recognized a criminal defendant's constitutional guarantee of a "'meaningful opportunity to present a complete defense,'" Crane held that, on the facts of the case, "the blanket exclusion of the proferred testimony about the circumstances of petitioner's confession deprived him a fair trial." Crane, 476 U.S. at 690 (emphasis added)(quoting California v. Trombetta, 467 U.S. 479, 485 (1984)).

Here, the trial court did not exclude evidence that bore on the admissibility of Petitioner's own confession. The issue, then, is whether the trial court erred in excluding – on relevance grounds – Petitioner's potential argument to the jury that, because the State elicited false confessions to the Temple killings from the Tucson Four, Petitioner's own confession also lacked reliability. Petitioner cites no United States Supreme Court case – and this Court's independent research has found no such decision – that requires a trial court to permit a defendant to argue that there is a relationship between the defendant's own confession and that of a different individual. In

fact, the Crane decision recognizes that a trial court may exclude evidence of a confession's credibility if there is "any valid state justification." 476 U.S. at 690-91. This Court agrees with the State trial court that the irrelevance of the Tucson Four confessions provided the sort of "valid state justification" to exclude the argument to the jury. "[T]he Constitution leaves to the judges who must make these decisions wide latitude to exclude evidence that is repetitive . . ., only marginally relevant or poses an undue risk of harassment, prejudice, [or] confusion of the issues." Crane, 476 U.S. at 689-90. The Supreme Court has "never questioned the power of States to exclude evidence through application of evidentiary rules that themselves serve the interests of fairness and reliability." Id. The trial court's exercise of its discretion to exclude irrelevant evidence regarding circumstances of other individual's confessions does not support federal habeas relief because the trial court did not unreasonably apply clearly established federal law as determined by the United States Supreme Court under 28 U.S.C. § 2254(d)(1).

Moreover, Petitioner was not denied the right to present a complete defense. The trial court permitted Petitioner to present evidence regarding the circumstances of his interrogation and confession. Additionally, two of the Tucson Four, Mark Nunez and Leo Bruce, testified on Petitioner's behalf regarding the circumstances of their arrests and the substance of their confessions. (Respondents' Exh. O at 3-64; JJ at 181-182) Based on the foregoing, the Court concludes that Petitioner was not denied his rights under either the due process clause or Crane to present a complete

defense including challenging the veracity of his confession. Accordingly, Petitioner's claim fails.

MOTION TO SUPPLEMENT THE RECORD, FOR EVIDENTIARY HEARING, AND FOR SCHEDULING ORDER

Petitioner also requests to supplement the record with "information developed within the last several years concerning the unreliability of confessions secured under the conditions that prevailed in this case" and has requested that the Court set a schedule "for such supplementation . . . ." (document # 17) On April 3, 2003, the Court ordered supplemental briefing in this matter. (document # 21) In response to the Court's order, Petitioner filed the information which he has previously sought permission to submit. (document # 17 and # 24) Namely, Petitioner attached several articles that were published in the Miami Hearld that document a series of false confessions that have become the subject of Florida and national news. (document # 17, Exh. A) Petitioner also attached an article from www.post-gazette.com that describes false confessions obtained in New York's Central Park Jogger cases. (document # 17, Exh. B)

The Court rejects this motion in its entirety. Although the Court is not unaware of news reports that document coerced confessions, the merits of Petitioner's habeas petition depend on what happened with respect to his own confessions. Accordingly, although Petitioner has already filed the supplemental materials with his most recent pleadings, the Court did not consider those materials in resolving this matter.

Petitioner also requests an evidentiary hearing. Petitioner requests an evidentiary hearing in this matter. Pursuant to 28 U.S.C. § 2254(e)(2),

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on claim unless the applicant shows that —
>
> (A) the claim relies on
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of underlying offense.

Additionally, an evidentiary hearing is not required in a habeas proceeding where reference to the state court record can resolve the issues. Totten v. Merkle, 137 F.3d 1172, 1176 (9th Cir. 1998)(holding that petitioner was not entitled to an evidentiary hearing on his claim on ineffective assistance of counsel.) Here, Petitioner had the opportunity fully to develop a factual record regarding his claims during the state court proceedings and the record is sufficient to resolve the issues presently before the Court. Accordingly, the Court finds that a hearing is not necessary.

Finally, there is no need for a briefing schedule in this matter. The Court has previously issued such schedules in this matter and the Petition is fully briefed.

CONCLUSION

Because Petitioner's claims for relief lack merit, the undersigned recommends that Petitioner's Petition for Writ of Habeas Corpus be denied.

Accordingly,

IT IS HEREBY RECOMMENDED that Petitioner's Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254 (document # 1) be **DENIED**.

IT IS FURTHER ORDERED that Petitioner's Motion to Supplement the Record, for a Briefing Schedule, and to set a Hearing Date (document # 17-1, 17-2, 17-3) is **DENIED**.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal rules of appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have ten (10) days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. See, 28 U.S.C. § 636(b)(1) and Rules 72, 6(a) and 6(e) of the Federal rules of Civil Procedure. Thereafter, the parties have ten (10) days within which to file a response to the objections. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the

findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

DATED this 12th day of December, 2003.

/s/_____
Lawrence O. Anderson
United States Magistrate Judge

Court of Appeals of Arizona,
Division 1, Department A.

STATE of Arizona, Appellee,
v.
Johnathan Andrew DOODY, Appellant.
No. 1 CA-CR 94-0120.

Sept. 5, 1996.
Review Denied Jan. 14, 1997.

Grant Woods, Attorney General by Paul J. McMurdie, Chief Counsel, Criminal Appeals Section and Crane McClennen, Assistant Attorney General, Phoenix, for Appellee.

Dershowitz & Eiger, P.C. by Victoria B. Eiger and Nathan Z. Dershowitz, New York City and Alan M. Dershowitz, Cambridge, MA and Peter Balkan, Phoenix, for Appellant.

OPINION

McGREGOR, Judge.

Johnathan Andrew Doody appeals his convictions and sentences for nine counts of first degree murder, nine counts of armed robbery, one count of burglary, and one count of conspiracy to commit armed robbery. For the reasons stated below, we affirm Doody's convictions and sentences.

I.

On the morning of August 10, 1991, members of the Wat Promkunaram Buddhist Temple discovered nine bodies inside the temple (the temple murders). The victims, including six Buddhist monks, lay face down in a circle, each shot in the head. Several of the victims had sustained additional, non-fatal shotgun wounds. Living quarters inside the temple had been ransacked, and items of personal property, including money, cameras, and stereo equipment, were missing. Police analysis of the bullets identified the murder weapon as a Marlin Model 60 .22 caliber rifle (Marlin rifle).

In September 1991, detectives received an anonymous tip implicating four men from Tucson (the Tucson Four) in the temple murders. During questioning, the suspects made inculpatory statements, based on which the state charged the Tucson Four with the temple murders.

In an attempt to locate the murder weapon, investigators issued an advisory directing all law enforcement agencies to report any Marlin rifles. Investigators subsequently received a report from Luke Air Force Base that a military officer had discovered a Marlin rifle during a search of a vehicle stopped in an unrelated incident. Investigators recovered the rifle from its owner, Rolando Caratachea, and later identified it as the temple murder weapon. Caratachea denied involvement in the temple murders and claimed that two minors, Doody and another friend, Alessandro Garcia, had

borrowed the rifle shortly before the murders.

Officers located Doody on October 25, 1991, at a high school football game. Doody agreed to accompany the officers to the police station for questioning. After arriving at the station, the officers advised Doody of his *Miranda* [FN1] rights. Doody indicated that he understood his rights and was willing to speak to the investigators without an attorney or his parents present.

> FN1. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Doody's interrogation began at 9:25 in the evening. Doody initially denied any knowledge of the events at the temple but, after two and one-half hours, made inculpatory statements and, after approximately four more hours of questioning, admitted to being at the temple on the night of the murders. Doody claimed that Caratachea and Garcia approached him with a plan to conduct a "war game," which entailed surrounding the temple without setting off the security system. Doody stated that he went to the temple with Caratachea, Garcia, and two others, George Gonzalez and his friend. Doody maintained that he had not intended to enter the temple but that, once past the security sensors, he followed the others inside. Doody stated that Caratachea, Garcia, Gonzalez, and the other participant ransacked the temple's living quarters and gathered the victims into the main room. Doody stated that one of the monks recognized Gonzalez, who then ordered Doody to go outside and confirm

that the walls were sound-proof. Doody maintained that the shootings occurred while he was outside and that he did not know who fired the shots. Officers did not complete the interview until after 10:00 the next morning.

Officers also questioned Garcia on the night of October 25, 1991. Garcia initially invoked his right to remain silent but, after consulting his father, agreed to give a statement regarding his involvement in the temple murders. Garcia claimed that Doody conceived the plan to rob the temple and persuaded Garcia to join him. Garcia stated that, once inside the temple, Doody insisted they leave "no witnesses" and that, despite Garcia's attempts to dissuade him, Doody shot each of the victims in the head with a rifle he had borrowed from Caratachea. Garcia claimed that he panicked and fired his shotgun in the direction of the victims. Garcia maintained that only he and Doody participated in the robbery and murders.

Investigators searched Garcia's home and discovered several items taken from the temple. Investigators also found a shotgun, later determined to be the gun that fired the shotgun shells recovered at the crime scene. Based on the confessions and the evidence collected at Garcia's home, the state dismissed the charges against the Tucson Four and charged Doody and Garcia with the temple murders. Following a juvenile transfer hearing at which Caratachea testified that Doody and Garcia had borrowed his rifle shortly before the murders, the court ordered Doody and Garcia to stand trial as adults.

Early in the pretrial proceedings, Doody and Garcia moved to suppress their confessions. After a ten-day suppression hearing, the trial court denied both motions. Garcia thereafter entered a plea agreement, pursuant to which the state agreed not to pursue the death penalty and Garcia agreed to testify against Doody. In addition, Garcia pled guilty to nine counts of first degree murder and one count of burglary in connection with the temple murders, as well as one count of first degree murder in an unrelated homicide (the Cameron murder).

The state proceeded to trial against Doody. At trial, Garcia testified consistently with his interrogation statements. The trial court did not allow Doody to cross-examine Garcia regarding the Cameron murder or other unrelated and uncharged offenses that Garcia had committed with Caratachea, including a series of burglaries and conspiracy to commit murder and armed robbery (the Cruz offenses). After Caratachea invoked his fifth amendment right not to testify at Doody's trial, the trial court allowed Doody to read into evidence Caratachea's testimony from the juvenile transfer hearing, except those portions of the transcripts referring to Caratachea's prior crimes.

The jury ultimately convicted Doody on each count. With respect to the first degree murder charges, the verdicts revealed that the jury premised Doody's convictions on felony murder rather than premeditated murder. The trial court subsequently sentenced Doody to nine consecutive life terms on the

murder counts and eleven additional prison terms on the remaining counts. [FN2] Doody now appeals. We have jurisdiction pursuant to Arizona Revised Statutes Annotated (A.R.S.) section 12-120.21.

> FN2. Following a mitigation hearing, the trial court rejected the death penalty based on Doody's age, lack of prior criminal record, and the fact that, under the terms of his plea agreement, Garcia would not receive the death penalty despite the possibility that Garcia, rather than Doody, fired the fatal shots.

II.

Doody asserts that the trial court erred by failing to suppress his confession. Prior to trial, the trial court conducted an evidentiary hearing to determine the admissibility of Doody's statements. The suppression hearing lasted ten days, with testimony on each day. Based on the evidence presented at the hearing, including testimony from the officers who questioned Doody and the audio tapes of Doody's interrogation, the trial court concluded that Doody confessed voluntarily and waived his constitutional rights knowingly and intelligently. We will not disturb the trial court's determination absent clear and manifest error. *State v. Lucas*, 146 Ariz. 597, 607, 708 P.2d 81, 91 (1985).[FN3]

> FN3. Doody urges this court to adopt a *de novo* standard of review, arguing that the audio tapes of Doody's complete interrogation provide us the same ability as the trial court

possessed to evaluate the voluntariness of his confession. Determining the voluntariness of a confession is by nature an intensely factual inquiry, and we rely on the trial court's assessment not only of tangible evidence reproducible on appeal, but intangible evidence, including the credibility of witness testimony. *See State v. Chapple,* 135 Ariz. 281, 297 n. 18, 660 P.2d 1208, 1224 n. 18 (1983). Here, the officers who questioned Doody testified at the suppression hearing that Doody understood the *Miranda* warnings and that he remained alert and responsive throughout the extended interrogation. Only the trial judge could evaluate the impact and credibility of the officers' testimony, and we will not substitute our judgment for that of the trial court absent clear error.

A.

Doody argues that the trial court should have suppressed his statements because the officers coerced him to confess. In Arizona, confessions are presumed to be involuntary, and the state must establish by a preponderance of the evidence that a defendant confessed voluntarily and freely. *State v. LaGrand,* 153 Ariz. 21, 26, 734 P.2d 563, 568, *cert. denied,* 484 U.S. 872, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987). In assessing the voluntariness of a confession, we "look to the totality of the circumstances surrounding the confession and determine whether the will of the defendant has been overborne." *State v. Lopez,* 174 Ariz. 131, 137,

847 P.2d 1078, 1084 (1992), *cert. denied*, 510 U.S. 894, 114 S.Ct. 258, 126 L.Ed.2d 210 (1993). With respect to juvenile confessions,

> the "greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair." Thus, we evaluate whether police conduct was coercive in the context of a juvenile confession by carefully scrutinizing not only the external circumstances under which the juvenile was questioned but also the juvenile's reasonably apparent cognitive abilities. We also consider other inherently coercive factors in the totality: the arguably coercive atmosphere of the police interrogation room; the focus of the investigation on defendant as the prime suspect; and police transportation to the station.

State v. Jimenez, 165 Ariz. 444, 449, 799 P.2d 785, 790 (1990) (citations omitted).

The trial court considered the factors set forth in *Jimenez*. At the time of questioning, Doody was seventeen and one-half years old and completing his junior year in high school. Doody told the officers that he maintained a B grade average. Doody participated in his high school honor guard and color guard and held a job at the Luke Air Force Base commissary. Doody spoke fluent, although lightly accented, English. Doody gave no indication of any mental disorder.[FN4] The trial court also considered the external circumstances of the interrogation,

specifically the time and duration of the interrogation, and concluded that, in light of the officers' testimony regarding Doody's demeanor and the court's own review of the audio tapes, the circumstances surrounding the interrogation did not warrant suppression.

> FN4. On appeal, Doody points to evidence presented at the sentencing proceedings concerning his background and communication skills. We limit our review of the admissibility of Doody's confession to the evidence before the trial court at the suppression hearing. *State v. Flower,* 161 Ariz. 283, 286 n. 1, 778 P.2d 1179, 1182 n. 1 (1989).

Doody argues that the length of the interrogation, which began in the evening and continued for almost thirteen hours without significant breaks, indicates that he did not confess voluntarily. We consider the length of an interrogation in determining voluntariness particularly when, as is true here, the interview continues for a long period of time. However, the troublesome length of Doody's questioning does not, in itself, establish that the officers overcame Doody's will to resist confessing. *See State v. Taylor,* 112 Ariz. 68, 81, 537 P.2d 938, 951 (1975), *cert. denied,* 424 U.S. 921, 96 S.Ct. 1127, 47 L.Ed.2d 328 (1976) (characterizing seven-hour interrogation as "long" but upholding the statements as voluntary in the absence of evidence that a lack of food and sleep contributed to the statements). Other factors indicate that, despite the length of the interrogation, Doody confessed voluntarily. Although

the entire interrogation lasted approximately thirteen hours, Doody admitted he had borrowed Caratachea's rifle at the time of the temple murders after approximately two and one-half hours of questioning. Doody admitted he had participated in the temple robbery after approximately six and one-half hours of questioning, and his description of the events at the temple spanned nearly two hours. During the remaining hours, the detectives reviewed Doody's testimony and probed for a connection to the Tucson Four.

Although Doody characterizes the tone of the interrogation as coercive, the audio tapes reveal a courteous, almost pleading style of questioning during most of the interview. Each of the officers involved in the interrogation testified at the suppression hearing that Doody remained alert and responsive throughout the interrogation and did not appear overtired or distraught. Our review of the audio tapes confirms the officers' testimony. Because Doody exercised his right not to testify at the suppression hearing, neither the trial judge nor this court has any basis for assuming that he would have contradicted the officers' testimony. The record, both at the time of the suppression hearing and after trial, includes no evidence that calls into question the testimony that Doody remained alert and responsive. Moreover, both before and during the interrogation, the officers offered Doody food and drinks and accommodated his requests to use the restroom. For those reasons, we conclude that the length of Doody's interrogation, in itself, does not mandate a finding of involuntariness.

Doody argues further that the trial court should have suppressed his statements because he did not have a parent or guardian present at the interrogation. We consider whether a parent is present during the questioning of a juvenile in evaluating voluntariness, but a parent's absence does not, in itself, render a confession involuntary. *State v. Hardy,* 107 Ariz. 583, 584, 491 P.2d 17, 18 (1971). Moreover, the absence of a parent weighs less heavily when, as here, the juvenile has not requested a parent or other adult. *Jimenez,* 165 Ariz. at 452, 799 P.2d at 793. At the outset of the interrogation, detectives asked Doody whether he wanted to have his parents present during questioning. Doody responded that he did not care whether his parents were present and thereafter agreed to speak with the detectives alone. [FN5] In light of Doody's age and his specific consent to speak with the officers without his parents, we reject Doody's argument that the absence of a parent renders his confession inadmissible.

> FN5. Doody argues on appeal that the officers took extraordinary steps to ensure that his father would not be available during the interrogation. At the outset of the interrogation, Doody specifically declined to have his parents present and did not request that they be contacted at any point during the questioning. Thus, whether the state acted to prevent Doody's father from attending the interrogation could not have affected the voluntariness of Doody's statements.

Bearing in mind Doody's individual characteristics and the external circumstances of the interrogation, we turn to the conduct of the police in obtaining Doody's confession. To be voluntary, a confession must not be induced by threats or promises of benefit or leniency, no matter how slight. *State v. Williams,* 136 Ariz. 52, 56, 664 P.2d 202, 206 (1983). Doody argues that the officers elicited his confession improperly by promising not to divulge his statements to the other suspects. We disagree. "Before a statement will be considered involuntary because of a 'promise,' evidence must be established that (1) a promise of benefit or leniency was in fact made, and (2) the suspect relied on that promise in making the statement." *Lopez,* 174 Ariz. at 138, 847 P.2d at 1085 (citing *State v. Amaya-Ruiz,* 166 Ariz. 152, 165, 800 P.2d 1260, 1273 (1990), *cert. denied,* 500 U.S. 929, 111 S.Ct. 2044, 114 L.Ed.2d 129 (1991)).

Applying the test set forth in *Lopez* and *Amaya-Ruiz,* we reject Doody's argument for two reasons. First, the detectives' statements did not constitute a "promise" because they "did not offer any benefit to the defendant in exchange for information." *State v. Hensley,* 137 Ariz. 80, 87, 669 P.2d 58, 65 (1983) (statement by officer that suspect's confession would not be admissible in court did not constitute a promise); *see Lopez,* 174 Ariz. at 138, 847 P.2d at 1085 (statement by officer that he would not play interrogation tapes for victim's mother did not constitute a promise). The trial court found, and we agree, that the officers assured Doody that his statements would not be disclosed to the other

suspects because the officers believed Doody's fear of reprisal affected his willingness to talk. The detectives did not imply that the state would not prosecute Doody if he revealed the information or that the state would not use his statements against him in a subsequent prosecution. *See State v. Burr,* 126 Ariz. 338, 340, 615 P.2d 635, 637 (1980). Second, Doody fails to establish that he relied on the statements in confessing. *See Amaya-Ruiz,* 166 Ariz. at 165, 800 P.2d at 1273; *see also Utah v. Strain,* 779 P.2d 221, 227 (Utah 1989) (recognizing that, under totality of circumstances test, a threat or promise does not render confession inadmissible absent reliance). For those reasons, we conclude that the trial court did not err in determining that "the statements by law enforcement that what defendant Doody said would not be told to others ... were not sufficiently compelling to overcome defendant Doody's will to resist confessing."

We also reject Doody's argument that the officers unfairly pressured him to confess. The officers used a variety of approaches in questioning Doody. They emphasized Doody's experience in the high school honor guard and color guard and appealed to his sense of honor as a soldier. At impasses in the interview, the police captain entered the interrogation room and likened himself to a commanding officer in the military, encouraging Doody to trust and confide in him. The officers feigned empathy with Doody's situation and pleaded with Doody to prove his innocence. The officers also indicated to Doody that other suspects had implicated him in the temple murders and that

Doody's best defense would be to explain his version of the events.

In *State v. Carrillo,* 156 Ariz. 125, 750 P.2d 883 (1988), the court addressed the propriety of deceptive interrogation tactics:

> The very nature of law enforcement encourages police to use some artifice and trickery in their work. *Miranda* curtailed many of the most egregious practices, such as the infamous "third degree." However, courts still tolerate some police gamesmanship, *so long as the games do not overcome a suspect's will and induce a confession not truly voluntary.*

Id. at 136, 750 P.2d at 894 (emphasis added) (citations omitted). The trial court correctly characterized portions of Doody's interrogation as "aggressive, energetic [and] forceful" but concluded that "the method and style used by law enforcement in questioning defendant Doody was permissible, i.e., lawful...." We agree. The officers conducting Doody's interrogation made no improper promises or threats and, although Doody did not speak for long periods during the interrogation, he never invoked his right to remain silent or his right to an attorney. The tactics, though deceptive in part, were not so egregious as to overcome Doody's will and, as discussed above, the record contradicts Doody's claim on appeal that the method of interrogation induced him to confess. With respect to the officers' statements that Doody's best defense would be to explain his involvement in the temple murders

before the other suspects placed primary blame on him, we note that " [a]dvice to tell the truth, unaccompanied by either a threat or promise, does not make a confession involuntary." *State v. Ross,* 180 Ariz. 598, 603, 886 P.2d 1354, 1359 (1994), *cert. denied,* 516 U.S. 878, 116 S.Ct. 210, 133 L.Ed.2d 142 (1995).

For these reasons, we conclude that the trial court did not abuse its discretion by admitting Doody's confession. Moreover, the trial court's decision to admit the confession did not constitute the final determination of voluntariness. In this case, as in all others, the jury was "the ultimate arbiter of voluntariness, and [was] free, in effect, [to] disagree with the judge, and reject the confession." *State v. Gretzler,* 126 Ariz. 60, 84, 612 P.2d 1023, 1047 (1980) (quotation omitted). The trial judge instructed the jury that Doody's statement was not voluntary if it resulted from his "will being overcome by a law enforcement officer's use of any sort of violence, coercion, or threats, or by any direct or implied promise, however slight." The judge told the jury to give Doody's statement whatever weight it deserved under all the circumstances. Following those instructions, the jury either found the confession voluntary and gave it appropriate weight or convicted Doody on the basis of other evidence.

B.

Doody also argues that the trial court should have suppressed his confession because the officers did not inform him sufficiently of his rights before

questioning him. To be admissible, "a confession must not only be free from coercion, but the defendant's waiver of his constitutional rights must be knowing and intelligent." *Jimenez,* 165 Ariz. at 449, 799 P.2d at 790. The Arizona Rules of Procedure for the Juvenile Court govern the admissibility of juvenile confessions, including statements made by a juvenile later charged as an adult:

> No extra-judicial statement to a peace officer by the child shall be admitted into evidence in juvenile court over objection unless the person offering the statement demonstrates to the satisfaction of the court that: The statement was voluntary and before making the statement the child was informed and intelligently comprehended that he need not make a statement, that any statement made might be used in a court proceeding, and that he had a right to consult with counsel prior to making a statement and during the taking of the statement, and that, if he or his parents, guardian or custodian could not afford an attorney, the court would appoint one for him prior to any questioning.

Ariz. R. Juv. Ct. P. 18; *see Jimenez,* 165 Ariz. at 450, 799 P.2d at 791. We determine whether extra-judicial statements resulted from a knowing and intelligent waiver of rights by considering whether, in light of the totality of circumstances, the officers "imparted a clear, understandable warning of all defendant's rights ... in language the defendant could comprehend and on which he could intelligently act." *State v. Mumbaugh,* 107 Ariz. 589, 597, 491 P.2d 443, 451 (1971).

The state initially argues that Doody waived his claim of error with respect to the adequacy of the *Miranda* warnings because he did not challenge the trial court's finding that he was not in custody. *See id.* at 593, 491 P.2d at 447 (explaining that, although warnings must precede custodial interrogations, no warnings are necessary for non-custodial questioning because "[w]here [a] defendant is not in custody or deprived of his freedom his answers are not deemed compelled....").

The state's waiver argument relies on an overbroad reading of the trial court's findings. The trial court's factual findings resolved only the limited issue that Doody "was not under arrest or in custody *when he was transported to the task force offices for questioning* on October 25, 1991." Contrary to the state's assertion, the trial court did not address whether Doody was in custody during the interrogation. Doody's failure to challenge the trial court's narrow finding that he was not in custody prior to the interview does not constitute a waiver of his argument that the officers failed to advise him sufficiently of his rights before obtaining his inculpatory statements. For purposes of review, we accept Doody's characterization of the questioning as a custodial interrogation requiring *Miranda* warnings.

Again considering the circumstances in their totality, we conclude that the trial court did not err in determining that the officers advised Doody of his *Miranda* rights in a clear and understandable

manner and that Doody made a knowing and intelligent waiver. At the outset of the interrogation, the officers advised Doody of his rights under *Miranda* and of his right to have a parent or guardian present during questioning. The officers also advised Doody of the possibility he later could be transferred to adult court. The officers read each warning from a standard juvenile form and provided additional explanations as appropriate. After reading each warning, the officers asked Doody if he understood the right involved and obtained his initials on the form. Although Doody had no prior experience with the criminal justice system, the officers explained the rights in a manner appropriate for his age and apparent intelligence.

The officers testified at the suppression hearing that Doody appeared to understand the warnings and exhibited no signs of doubt or confusion. Based on that testimony and the court's review of the taped interrogation, the trial court concluded that the officers adequately advised Doody of his rights and obtained an appropriate waiver before continuing. In so holding, the trial court expressly considered Doody's age, intelligence, and lack of prior exposure to the criminal justice system. Our review of the record, including the audio tape of the warnings, supports the trial court's finding that Doody knowingly and intelligently waived his rights, and therefore we will not disturb the court's ruling.

III.

Doody next challenges the trial court's evidentiary

rulings pertaining to testimony from the Tucson Four. Doody argues that the trial court erred by permitting him to present the confessions of the Tucson Four only to establish and argue the truth of their confessions. Had he not been so limited, Doody asserts, he could have presented evidence of improprieties in the Tucson Four interrogations and could have proved and argued that his own confession, which he attributes to "the same police officers using many of the same interrogation techniques," was false, as were the Tucson Four confessions. Doody's argument on appeal that testimony from and confessions by the Tucson Four were admissible to show his confession was involuntary, however, is not only different from but also inconsistent with the basis on which Doody urged their admissibility in the trial court. Because a party may not assert an evidentiary theory for the first time on appeal, *State v. Serna*, 163 Ariz. 260, 267, 787 P.2d 1056, 1063 (1990), we reject this argument.

The question whether Doody could use the Tucson Four confessions first arose in the context of a motion in limine through which the state sought to preclude the defense from using statements by the Tucson Four. The state, not Doody, argued the Tucson Four statements should be excluded as unreliable and irrelevant. In response, Doody asserted the statements were relevant to his defense that the Tucson Four, not Doody, committed the temple murders and that a reasonable person could believe their confessions to be true. Doody gave no indication whatever that he intended to use the statements to

establish that, because the Tucson Four confessions were not reliable, Doody's admissions also were not reliable. Moreover, as is self-evident, such an argument would have been inconsistent with the basis on which Doody had argued the trial court should admit the statements.

After hearing argument, the trial court agreed with Doody. The court first found the statements clearly relevant to whether the Tucson Four or Doody committed the temple murders and then weighed the probative value against the prejudicial effect of the statements. Commenting that the jury would determine the credibility and voluntariness of the Tucson Four statements, the court determined that the statements would be admissible if the declarants were unavailable at trial.

Two of the Tucson Four, Mark Nunez and Leo Bruce, testified for Doody. Defense counsel questioned Nunez about the circumstances of his arrest and interrogation. During argument in chambers, Doody justified his examination into these areas by stating that he had two reasons for presenting the information. First, he wanted the jury to understand that the defense was presenting the full story, which he thought would add to the credibility of the defense. Second, since the prosecution intended to argue that the statements were unreliable, Doody wanted to "draw the sting." As had been true during earlier proceedings, Doody did not assert any intention of drawing parallels between the Tucson Four and the Doody interrogations.

Both Doody and the prosecution then questioned Nunez and Bruce extensively about the circumstances surrounding their interrogations and the content of their confessions. After the court found that Michael McGraw and Dante Parker, the remaining members of the Tucson Four, were unavailable as witnesses, the jury heard the audio recording of Parker's questioning and the court admitted into evidence McGraw's statement.

During a conference among the trial judge and lawyers, held outside the presence of the jury several days after the Tucson Four testimony ended, Doody asserted that, if the prosecution intended to suggest that Doody's confession was reliable because the officers had discontinued the abusive practices used in the Tucson Four interrogations, the trial court should allow Doody to present evidence of "continuing abuses and similarities" in his own interrogation. At that point, the trial court commented that what occurred in the Tucson Four case was not relevant to the validity of Doody's statements. The court emphasized, as it had on several other occasions, that Doody could present to the jury any evidence related to his confession that would render it unreliable, including all the circumstances surrounding his confession.

Doody now asserts that the trial court, by foreclosing an argument that his confession, like those of the Tucson Four, was false, violated the principles set forth in *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). We reject Doody's argument for several reasons. First, *Crane* does not

apply. There, the Court held that a trial court may not exclude evidence concerning the manner in which the police obtain a defendant's confession because the environment that yields a confession bears on its reliability. *Id.* at 689, 106 S.Ct. at 2146. The trial court here fully complied with that holding. The jury heard the audio tapes of Doody's entire interrogation. All officers involved in taking his statement testified. The trial court excluded no evidence concerning the manner in which the police obtained Doody's confession. Moreover, contrary to Doody's statements on appeal, the trial court permitted Doody to present substantial evidence about the circumstances surrounding the interrogations of the Tucson Four. As noted above, two of the Tucson Four testified extensively about their interrogations, and the jury heard the tape of a third interrogation. Doody made no offer of proof as to any additional evidence he wanted to introduce with respect to the circumstances surrounding the Tucson Four confessions, and therefore provides no basis for further review by this court. *See* Ariz. R. Evid. 103(a); *see also Jones v. Pak-Mor Mfg. Co.*, 145 Ariz. 121, 129, 700 P.2d 819, 827, *cert. denied*, 474 U.S. 948, 106 S.Ct. 314, 88 L.Ed.2d 295 (1985).

Second, Doody failed to preserve for appeal the issue whether the trial court should have admitted Tucson Four evidence as relevant to establish the truth or falsity of Doody's confession. Arizona, like most other jurisdictions, has never held that showing the police obtained a false or involuntary confession from one defendant proves whether a second defendant's confession is false or involuntary. Assuming, without

deciding, that substantial similarity of circumstances, interrogators, and defendants could render the voluntariness of one confession relevant to the issue of another confession's voluntariness, we find that Doody made no such showing in this case. Doody cites to no portion of the record, and our own review has disclosed none, in which he identified for the trial court the similarities between his interrogation and those of the Tucson Four that he now regards as sufficient to support his argument that the truthfulness of one is probative of the truthfulness of the other. Indeed, the record does not support even those general references Doody makes on appeal. For instance, although Doody categorically states on appeal that his confession was "obtained by the same police officers using many of the same interrogation techniques" used with the Tucson Four, the record discloses substantial differences in approach and questioners. Doody also made no offer of proof describing the evidence he would offer to establish a link between interrogation techniques and falsity of statements.

Doody's averments to the court that he intended to present the Tucson Four evidence to establish the truth of their confessions, his failure to offer the Tucson Four evidence for the purpose of proving the falsity of his confession, and his failure to define which similarities he regarded as providing sufficient basis for comparing the confessions, lead us to conclude that Doody waived this argument on appeal.

IV.

Doody next argues that the trial court erred by restricting his cross-examination of Garcia with respect to unrelated crimes Garcia committed before and after the temple murders. Although the right to cross-examine a witness is vital to the right of confrontation, the trial court reserves discretion to curtail the scope of cross-examination to within "reasonable" limits. *State v. Fleming,* 117 Ariz. 122, 125, 571 P.2d 268, 271 (1977). We review a trial court's order restricting the scope of cross-examination on a case-by-case basis to determine whether the court unduly inhibited the defendant's ability to present information bearing on issues or on the credibility of witnesses. *Id.* The trial court exercises considerable discretion in determining the proper extent of cross-examination, and we will not disturb the court's ruling absent a clear showing of prejudice. *State v. Rodgers,* 134 Ariz. 296, 301, 655 P.2d 1348, 1353 (App.1982).

Doody contends that the trial court improperly prohibited him from cross-examining Garcia about the details of the Cameron murder. Doody argued at trial that the details of the Cameron murder illustrated Garcia's motive and bias because, due to the aggravating factors of the Cameron murder, Garcia would have received the death penalty for that crime. If the details of the Cameron murder were admitted, Doody asserted, the evidence would demonstrate the extent of the benefit Garcia received under the terms of his plea agreement, which prohibited imposition of the death penalty. The court

correctly rejected the introduction of the Cameron murder evidence, however, because the circumstances surrounding the Cameron murder were relevant only to whether a trial judge would have imposed the death penalty in a separate trial for that crime. *See* A.R.S. § 13-703. The trial court allowed Doody to illuminate the full extent of the benefit Garcia received by agreeing to testify against Doody. Graphic details of the Cameron murder would have added nothing of relevance to establish Garcia's motive or bias, and the trial court did not abuse its discretion by limiting Doody's cross-examination as to the details of the Cameron murder.

Doody next argues that the trial court erroneously prohibited him from cross-examining Garcia about the Cruz offenses. At trial, Doody argued that evidence disclosing the details of the Cruz offenses would further illustrate the benefit Garcia received under his plea agreement because, although the plea agreement did not encompass the Cruz offenses, Garcia may have anticipated that the state would not prosecute him for those crimes in exchange for his testimony against Doody. Again, the trial court allowed Doody to question Garcia regarding the benefits he anticipated as part of his plea agreement, including whether he believed he would be exempt from prosecution for the Cruz offenses. As with the Cameron murder, the details of the Cruz offenses would have added nothing relevant to Garcia's motive or bias. We therefore affirm the court's ruling.

Doody also argues that the trial court should have

allowed him to cross-examine Garcia about the Cruz offenses and other burglaries Garcia committed with Caratachea to impeach Garcia's character for truthfulness. Doody did not argue impeachment as a basis for admissibility, however, until this appeal. At trial, Doody argued only that evidence of past conduct involving Garcia and Caratachea was admissible to prove that Caratachea participated in the temple murders. The trial court correctly rejected Doody's proposed evidence as irrelevant, unduly prejudicial, and inadmissible under Rule 404(b) of the Arizona Rules of Evidence.

This court generally does not review evidentiary theories raised for the first time on appeal. *Serna*, 163 Ariz. at 267, 787 P.2d at 1063. In any event, we find no merit to impeachment as a basis for cross-examining Garcia regarding the Cruz offenses or the burglaries. On cross-examination, a party may inquire into specific instances of a witness's prior conduct for impeachment purposes only if the conduct is probative of the witness's character for truthfulness. Ariz. R. Evid. 608(b); *State v. Woods*, 141 Ariz. 446, 449, 687 P.2d 1201, 1204 (1984). Because Doody provides no support for his assertion that Garcia's past conduct bears any relation to his character for truthfulness, we find no error in the court's limitation of his cross-examination.

Doody argues alternatively that evidence of Garcia's past conduct with Caratachea establishes Garcia's motive and bias to implicate Doody and exculpate Caratachea in the temple murders. Doody also did not assert motive or bias as a basis for admissibility

during trial proceedings and, as stated above, failure to argue an evidentiary theory in the trial court constitutes a waiver on appeal. *Serna,* 163 Ariz. at 267, 787 P.2d at 1063. Moreover, we find no merit in Doody's argument that Garcia's history of criminal activity with Caratachea influenced Garcia to favor Caratachea over Doody, given the fact that Doody also allegedly participated in at least some of the criminal activity.[FN6]

FN6. In support of his claim of error, Doody relies upon *United States v. Robinson,* 530 F.2d 1076 (D.C.Cir.1976). That decision recognizes that a trial court exercises discretion in deciding whether to permit cross-examination concerning other criminal activities to establish a witness's bias or motive to lie. In *Robinson,* the court merely concluded that the trial court did not abuse its discretion in admitting such evidence, after balancing the probative value against the prejudicial effect of the evidence. Moreover, the evidence at issue in *Robinson* involved "an ongoing affair related in subject matter and time to the transactions charged against defendant." *Id.* at 1081. In contrast, no direct connection exists between the temple murders and the other offenses involving Garcia and Caratachea. Under these circumstances, the trial court did not abuse its discretion in rejecting Doody's attempt to cross-examine Garcia about other uncharged criminal offenses.

Doody also argues that the trial court erred by prohibiting him from establishing that Garcia had used the phrase "no witnesses" in connection with the Cameron murder. We find the limitation falls well within the trial court's discretion. Doody maintains that Garcia's use of the phrase "no witnesses" in the Cameron murder, which occurred shortly after the temple murders, supports the proposition that Garcia, rather than Doody, executed the temple victims so that "no witnesses" would remain. However, the trial court allowed Doody to question Garcia about his use of the phrase "no witnesses," and Garcia acknowledged at trial that he had used the phrase "no witnesses" after the temple murders. Moreover, Doody makes no showing of prejudice stemming from the court's limitation on his ability to link Garcia's use of the phrase "no witnesses" specifically to the Cameron murder. If any error occurred, it was harmless and provides no basis for reversal.

V.

Doody next contends that the trial court erroneously permitted Caratachea to invoke his right to remain silent.[FN7] Doody argues that Caratachea waived his right by testifying under oath at Doody's juvenile transfer hearing. We disagree.

FN7. U.S. Const. amend. V.

A waiver of the fifth amendment privilege affects only the particular proceeding in which the waiver occurs. *Nelson v. Hannah,* 122 Ariz. 296, 297, 594

P.2d 550, 551 (App.1979) (citing *Ottomano v. United States,* 468 F.2d 269 (1st Cir.1972), *cert. denied,* 409 U.S. 1128, 93 S.Ct. 948, 35 L.Ed.2d 260 (1973)). Caratachea's waiver of his fifth amendment right at the juvenile transfer hearing, a proceeding separate from the trial, did not constitute a waiver of his right to refuse to testify at trial. *See United States v. Licavoli,* 604 F.2d 613, 623 (9th Cir.1979), *cert. denied,* 446 U.S. 935, 100 S.Ct. 2151, 64 L.Ed.2d 787 (1980) (holding that a witness may invoke the privilege against self-incrimination at trial despite testifying previously before a grand jury in the same case). Juvenile transfer hearings, like grand jury proceedings, determine whether further proceedings are appropriate; the testimony of a witness at a juvenile transfer hearing, like testimony at a grand jury proceeding, does not compromise the witness's later right to refuse to testify at trial in the same case.

Doody argues alternatively that Caratachea could claim no fifth amendment privilege with respect to certain burglaries for which he already had been adjudicated and that the trial court therefore should have required him to invoke his fifth amendment privilege with respect to his involvement in the temple murders in the presence of the jury. We disagree. In *State v. McDaniel,* 136 Ariz. 188, 665 P.2d 70 (1983), the court held that if "a witness could legitimately refuse to answer essentially all relevant questions, then that witness may be totally excused without violating an individual's Sixth Amendment right to compulsory process." *Id.* at 194, 665 P.2d at 76. Here, the trial court disallowed evidence

concerning Caratachea's previously adjudicated burglaries on the basis of relevance. *McDaniel* supports the trial court's decision because Caratachea legitimately could refuse to answer all *relevant* questions and therefore could be excused from invoking his right in front of the jury. Because Doody offers no convincing argument to establish the relevance of those burglaries, we find no error.

Doody further argues that the trial court erred in redacting Caratachea's prior testimony to eliminate references to Caratachea's prior crimes and misconduct. Doody contends that the trial court should have admitted evidence of Caratachea's criminal history for impeachment purposes. On appeal, Doody states that "Doody's counsel argued vigorously that it was improper to excise from Caratachea's prior testimony references to his myriad of other crimes, conduct with which Caratachea had been impeached by both the state and the defendant when he originally gave that testimony." The only citation to the record Doody provides refers this court to the transcript of Caratachea's prior testimony as redacted. Failure to provide citation to the record in support of an argument, as required by Rule 10(c)(1) of the Arizona Rules of Criminal Appellate Procedure, justifies this court in disregarding the argument. However, we have independently reviewed the objections Doody made to redaction. At no point did Doody object to the redaction of Caratachea's testimony regarding Caratachea's prior conduct on the basis that he wished to use the evidence for impeachment. Failure to preserve impeachment as a basis for admissibility

waives the issue on appeal. *See Serna,* 163 Ariz. at 267, 787 P.2d at 1063.

Finally, Doody argues that the trial court erred in permitting the state to withhold immunity from Caratachea while granting immunity to several prosecution witnesses. The state exercises sole discretion in granting immunity to witnesses. *State v. Fisher,* 141 Ariz. 227, 243, 686 P.2d 750, 766, *cert. denied,* 469 U.S. 1066, 105 S.Ct. 548, 83 L.Ed.2d 436 (1984). The state's refusal to grant a particular witness immunity does not violate a defendant's right to due process absent prosecutorial misconduct or, alternatively, a showing that the witness would present clearly exculpatory evidence and that the state has no strong interest in withholding immunity. *State v. Axley,* 132 Ariz. 383, 388, 646 P.2d 268, 273 (1982). Neither of those exceptions applies here, and we find no error.

VI.

Doody argues next that the trial court erred in its evidentiary rulings excluding testimony from James Herron. Prior to trial, Herron gave a sworn statement to investigators, in which he recounted conversations with Caratachea while they were in juvenile detention together. In the statement, Herron claimed that Caratachea had told him that Garcia, not Doody, shot the victims and that Doody believed he was participating in a war game at the temple. Herron also stated that Caratachea had boasted that his autograph would be valuable some day because of his involvement in the temple murders. Herron

provided the officers a slip of paper bearing Caratachea's signature as proof of the conversations. After Herron repeated his statements in a pretrial defense interview, Doody subpoenaed Herron to testify at trial. Herron failed to appear pursuant to the subpoena, however, and the trial court ruled that his sworn statement constituted inadmissible hearsay.

Herron's sworn statement contains two layers of hearsay, Caratachea's statements to Herron and Herron's statements to the investigators. We will uphold the trial court's exclusion of the sworn statement if either level fails to qualify for admission as an exception to the hearsay rule. *See* Ariz. R. Evid. 805; *State v. McGann,* 132 Ariz. 296, 298 n. 1, 645 P.2d 811, 813 n. 1 (1982). Doody argues that the exception for statements against interest applies to Caratachea's statements to Herron and that the residual hearsay exception for unavailable witnesses applies to Herron's sworn statement to the investigators.

The exception for statements against interest, set forth in Rule 804(b)(3), creates an exception for

> [a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. *A statement tending to expose the declarant to*

> *criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.*

Ariz. R. Evid. 804(b)(3) (emphasis added). Because Caratachea's statements to Herron implicated him in the temple murders and were offered to exculpate Doody, the statements are inadmissible unless corroborating circumstances ensure the statements' trustworthiness.

In *State v. Lopez*, 159 Ariz. 52, 764 P.2d 1111 (1988), the court defined the standard for assessing the admissibility of a statement against interest:

> The trial judge should examine both the corroborating evidence and the contradictory evidence. The judge's inquiry should be limited to the question of "whether evidence in the record corroborating and contradicting the declarant's statement would permit a reasonable person to believe that the statement could be true." If the judge determines that a reasonable person could conclude that the statement could be true, the evidence comes in for the jury's consideration.

Id. at 54-55, 764 P.2d at 1113-14 (citations omitted) (quoting *LaGrand*, 153 Ariz. at 27, 734 P.2d at 569). Here, Caratachea's signature provides the only evidence corroborating his statements to Herron. At best, the signature corroborates that a conversation between Caratachea and Herron occurred; the signature provides little corroboration for the

substance of the conversation. Moreover, even if we were to regard the signature as providing the necessary corroboration to render Caratachea's statements to Herron admissible, the trial court correctly excluded Herron's account of Caratachea's statements, the outer layer of hearsay, as inadmissible.

Doody concedes that Herron's sworn statement summarizing his conversations with Caratachea fails to qualify for admission as former testimony under Rule 804(b)(1). Doody argues, however, that the trial court should have admitted Herron's sworn statement under the residual hearsay exception for unavailable witnesses, set forth in Rule 804(b)(5). The "catch-all" provision of Rule 804(b)(5) provides an exception for statements not covered by an established hearsay exception but "having equivalent circumstantial guarantees of trustworthiness...." Ariz. R. Evid. 804(b)(5). Thus, a statement proffered pursuant to Rule 804(b)(5) must have "particularized guarantees of trustworthiness" that the statement is "at least as reliable as evidence admitted under a firmly rooted hearsay exception." *State v. Luzanilla*, 179 Ariz. 391, 394, 880 P.2d 611, 614 (1994), *cert. denied*, 514 U.S. 1039, 115 S.Ct. 1406, 131 L.Ed.2d 293 (1995). To assess whether a statement bears the requisite indicia of trustworthiness, the trial court "may not consider corroborating evidence, but must instead look to 'the totality of circumstances ... that surround the making of the statement and that render the declarant particularly worthy of belief.' " *Id.* (quoting *Idaho v. Wright*, 497 U.S. 805, 819, 110 S.Ct. 3139, 3148, 111 L.Ed.2d 638 (1990)).

Doody sets forth the following factors as indicative of the sworn statement's reliability: (1) Herron made the statement voluntarily and under oath, (2) Herron did not know Doody and therefore had no motive to lie, (3) Herron's statement was taken by police officers and recorded by a court reporter, and (4) Herron made similar statements in other interviews. However, other factors cast doubt on the reliability of Herron's statement.

The trial court reviewed sealed documents describing Herron's mental condition and juvenile record, which related to his credibility. Although Herron made his statement under oath, "giving an oath prior to testifying, in and of itself, is not a circumstance making it highly unlikely for a person to lie-at least so unlikely that cross-examination would add little." *Luzanilla,* 179 Ariz. at 394-95, 880 P.2d at 614-15. Considering all the circumstances surrounding Herron's sworn statement, we find no error in the trial court's conclusion that Doody failed to make the requisite showing of reliability. Additionally, Herron's sworn statement does not constitute the type of rare or exceptional evidence contemplated by Rule 804(b)(5). *See id.* at 398, 880 P.2d at 618 (explaining that evidence "generally admissible under Rule 804(b)(1) but for its missing element" is not the type of evidence for which Rule 804(b)(5) provides an exception to the hearsay rule). For those reasons, we conclude that the trial court properly excluded Herron's sworn statement as inadmissible hearsay.

Doody next challenges the trial court's refusal to reopen the trial to accept Herron's testimony. Following closing arguments, the trial court heard, through several layers of informants, that Herron may have agreed to surrender the next day. The court nevertheless proceeded to instruct the jury. When Herron later arrived at the court, Doody moved to reopen his case to present Herron's testimony. The trial court denied Doody's motion.

The trial court exercises its discretion in evaluating a motion to reopen. *State v. Thomas*, 110 Ariz. 120, 131, 515 P.2d 865, 876 (1973). In deciding whether to reopen, the trial court should consider whether "all the evidence, offered in good faith and necessary to the ends of justice has been heard." *State v. Mendoza*, 109 Ariz. 445, 448, 511 P.2d 627, 630 (1973) (quoting *State v. Favors*, 92 Ariz. 147, 149, 375 P.2d 260, 261 (1962)). We find no abuse of discretion in the trial court's decision not to reopen.

As discussed above, the subject of Herron's proposed testimony, Caratachea's statements, may well have constituted inadmissible hearsay. Even if admissible, Herron's testimony had little probative value. In his statement, Herron claimed that Caratachea told him that Doody believed he was playing a war game. However, Herron then clarified that Caratachea said that the war game included robbing the temple. Herron's statement also indicated that Doody was not tricked into participating in the events at the temple, as Doody claimed. In ruling against reopening, the trial court considered the attenuated nature of the proposed evidence, weighed against the

prejudicial effect of allowing more testimony to be heard and conducting additional closing arguments, coupled with the suspicious timing of Herron's arrival. The trial court was in a far better position than are we to determine the impact on the jury of reopening the trial, after closing arguments and instructions, for testimony from one witness. In light of the court's concerns, we cannot conclude that the trial court's decision constituted clear and manifest error.

Further, because the jury rejected the premeditated murder charges, any error in failing to reopen the case to accept Herron's testimony constitutes harmless error. Error is harmless "if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict." *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993), *cert. denied*, 511 U.S. 1046, 114 S.Ct. 1578, 128 L.Ed.2d 221 (1994). At best, Herron's testimony would have established that Doody believed he was participating in a war game to rob the temple, which may have negated premeditation. Herron's testimony, however, directly inculpated Doody on the charges of felony murder, the basis on which he was convicted. If Herron had testified, the effect would have been to strengthen the felony murder evidence against Doody. We therefore conclude, beyond a reasonable doubt, that the alleged error did not contribute to or affect the verdict.

VII.

For the reasons stated above, we affirm Doody's

convictions and sentences.

WEISBERG, P.J., and TOCI, J., concur.
Ariz.App. Div. 1, 1996.
State v. Doody
187 Ariz. 363, 930 P.2d 440

APPENDIX D

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

Received	Processed
Nov.20 '92	Nov. 23 '92
Clerk of the Court	Dist. Center

Clerk of the Court

November 19, 1992 HONORABLE GREGORY H. MARTIN
Y.Allen
Deputy Clerk

No. CR 92-01232 and CR 92-02096

	County Attorney
STATE OF ARIZONA	By: Myrna Parker
	By: K.C. Scull
v.	By: Paul Ahler
JONATHAN ANDREW DOODY	Peter S. Balken

CR 92-02096

STATE OF ARIZONA

v.

ALESSANDRO GARCIA	Luis Calvo
	Victim Witness Division

The Court has had under advisement the

defendants' motions to suppress their statements given to law enforcement. The Court has read the pleadings and considered the evidence adduced at the evidentiary hearing and the arguments of counsel.

With respect to defendant Doody, the issue appears to the Court to be whether the defendant's will to resist confessing was overborne by the law enforcement officials conducting the interrogation. Regarding defendant Garcia, the issue appears to the Court to be whether the defendant's Miranda right to counsel was violated when the defendant invoked his right to counsel during the interrogation and then later confessed after further interrogation without counsel present.

With respect to defendant Doody, the evidence shows that on October 25, 1991, he was 17 years of age and, at the time, attending Agua Fria High School located in Maricopa County. Law enforcement had received recent information from sources that a gun which had been in the possession of both defendants at about the time of the murders at the Wat Promkunaram Buddhist Temple was identified as a weapon used in the murders. As a result, defendant Doody was contacted by law enforcement at his high school where he was attending a football game and asked if he would voluntarily accompany the officers to further discuss the subject matter of the weapon, which had been previously discussed between defendant Doody and law enforcement approximately a month and a half before. Defendant Doody agreed to do so and was taken down to task force headquarters in Phoenix. The questioning of defendant Doody began

at around 9:30 p.m. on October 25. The questioning of defendant Doody continued for approximately thirteen hours into the next day. A number of law enforcement officers participated in the questioning. Defendant Doody was advised of his Miranda rights at the outset of the process and was, from time to time, offered food, drink, and the opportunity to use the bathroom facilities. Defendant Doody, during the questioning, confessed to being involved in criminal conduct which resulted in the murders of the victims.

Defendant Doody contends that his incriminating statements were involuntary in that they were coerced by the conduct of the law enforcement officials while questioning him. The evidence, indeed, shows that at the beginning of the questioning, and, in fact, for several hours, defendant Doody did not confess. The evidence does show that defendant Doody did admit to being involved after approximately six and a half hours of questioning. The evidence shows that for much of the time, before defendant Doody did confess, law enforcement was imploring him to tell them what happened. The evidence tapes of the questioning indicate that many minutes went by when defendant Doody would be silent while the law enforcement officers practically pleaded with him to talk. The evidence is that law enforcement on many occasions told defendant Doody that what he told them would not, in effect, be told to others. In that regard, this Court concludes that law enforcement felt that defendant Doody had, perhaps, been threatened by others who might be involved in the murders and was reluctant to talk out of fear of reprisal. At that time, law enforcement was also

questioning other acquaintances of defendant Doody and had already arrested four individuals from Tucson.

As to this defendant, this Court finds that he was not under arrest or in custody when he was transported to the task force offices for questioning on October 25, 1991. Even though not in custody, law enforcement did advise defendant Doody of his Miranda rights in language that could, and, in fact, was, clearly understood by defendant Doody. This Court further finds that defendant Doody did knowingly, voluntarily, and intelligently give up his right to remain silent and to have an attorney or a parent present while being questioned and did agree to talk. In finding a valid waiver, the Court has considered defendant Doody's apparent intelligence and education, his age, his apparent sound physical and mental condition, and the fact that he had no previous contact with the criminal justice system.

Without a doubt, the law enforcement officers who were questioning defendant Doody wanted him to cooperate. The matching of the weapon thought to have been in the possession of the defendants with evidence at the murder scene was a major breakthrough in the investigation. Further, the Court believes that it would not be unfair or an overstatement to characterize the manner of questioning by law enforcement as aggressive, energetic, or forceful. The statements by law enforcement that what defendant Doody said would not be told to others, the Court reasons, were not sufficiently compelling to overcome defendant Doody's will to resist confessing. The purpose of questioning

defendant Doody was obvious: to discover anything he might know in connection with the murder of nine people. Defendant Doody was thought to have knowledge about circumstances concerning the crimes by virtue of him being in possession of a weapon involved in the killings around the time of the killings. This Court now resolves that the method and style used by law enforcement in questioning defendant Doody was permissible, i.e., lawful, and that defendant Doody was neither made any improper promises of benefit nor threatened or coerced to confess.

This Court, having considered this issue thoroughly as it relates to defendant Doody, finds that the statements made by defendant Doody were made voluntarily. In determining that the statements were voluntarily made, the Court has considered the time, duration, and location of the questioning, the fact that Miranda warnings were given, and, again, the defendant's youth, and inexperience with the criminal justice system.

IT IS ORDERED denying defendant Doody's Motion to Suppress Statements.

As mentioned above, the issue regarding defendant Garcia is different. Unlike defendant Doody's case where the facts of what happened are for the most part undisputed and apparent from the evidence tapes, the material facts relating to defendant Garcia's issue are more difficult to determine. Defendant Garcia contends that law enforcement initiated questioning of him after he had invoked his right to counsel. The State argues that it was

items from the home of defendant Garcia pursuant to a search warrant which were thought to have come from the temple. After asking for a lawyer, defendant Garcia was told to wait, was not free to leave, and was, therefore, in custody at that point. Up to that moment and even thereafter, defendant Garcia was offered food, drink, and the use of a bathroom. Law enforcement was deciding what would be the next step concerning defendant Garcia. At one point, defendant Garcia asked law enforcement why he was there at the offices. Defendant Garcia indicated a desire to contact his parents and was informed that his father, who had, in the meantime, contacted law enforcement about his son, was in route to the task force offices.

Approximately two hours after defendant Garcia had requested a lawyer, defendant Garcia was taken from the interview room where he had been and walked to another room within the task force offices where he was photographed and fingerprinted. Defendant Garcia was walked past Rolando Caratachea, an acquaintance of defendant Garcia who was also being questioned, in an attempt to elicit cooperation or a response from Caratachea. While being photographed and fingerprinted, Sgt. Kimball of the task force, who had not been involved with defendant Garcia to that point, noticed that defendant Garcia was alone with a female identification technician. Sgt. Kimball had been advised that defendant Garcia had requested a lawyer. Sgt. Kimball entered the room where defendant Garcia was because defendant Garcia was alone with the female identification technician and also to inquire of defendant Garcia if he was alright and if he needed

anything. With that, defendant Garcia inquired what was going to happen to him. Sgt. Kimball responded that he did not know and that certain decisions were being made. Defendant Garcia wanted to know what could happen, whereupon Sgt. Kimball said that defendant Garcia could go to jail or "walk out". In that regard, there were no promises made. Defendant Garcia then asked what would happen if he told the truth and St. Kimball indicated that the best decision was always to tell the truth but the decision to do that was defendant Garcia's. Sgt. Kimball informed defendant Garcia that they could not legally speak with him again and they would not, in fact, question him. Defendant Garcia did speak with his father privately and then indicated a desire to speak, once again, with law enforcement. Defendant Garcia was advised of his Miranda rights a second time, which he understood, and agreed to talk with law enforcement without a lawyer. Defendant Garcia, over a period of several more hours, confessed to his involvement in the crimes at the temple.

The law is clear that once the right to counsel has been asserted by an accused, further interrogation of the accused should not take place unless that accused initiates further communications, exchanges, or conversations with law enforcement.

As stated above, this Court now determines that when Sgt. Kimball approached the defendant, he did so out of concern for the welfare of the female identification technician, who was alone with defendant Garcia, and to inquire of defendant Garcia if he was alright. The Court finds that defendant Garcia

was not approached by Sgt. Kimball to speak about the investigation and that Sgt. Kimball, in first asking defendant Garcia if he was alright or how he was doing, did not initiate the investigative questioning again. There seems nothing wrong with law enforcement inquiring of defendant Garcia about matters relating to defendant Garcia's custody. The court concludes that, when defendant Garcia responded with "what's going to happen to me?", it was defendant Garcia who evidenced a desire to open up a more generalized discussion relating to the investigation. The evidence is clear that Sgt. Kimball was then careful to remind defendant Garcia that if defendant Garcia wished to talk again about the case that the decision was his to make and that law enforcement could not speak to him unless he, defendant Garcia, wished to speak. Moreover, there is nothing in the evidence to suggest that law enforcement used defendant Garcia's father in an manner to violate the rights of defendant Garcia. Finally, though, again, what happened concerning this issue is not on tape, once defendant Garcia and law enforcement were back on tape, what occurred off the tape was reconstructed in a manner with which defendant Garcia agreed. Therefore, this Court finds no violation of the Edwards rule in this case.

What then transpired is that defendant Garcia, after being advised of his Miranda rights for a second time, knowingly, voluntarily, and intelligently waived his right to counsel and his right to remain silent.

This Court having considered the evidence as it relates to defendant Garcia, finds that the statements

given by defendant Garcia were given voluntarily. As with defendant Doody, in finding that defendant Garcia's statements are voluntary, the Court has considered the fact that defendant Garcia was 16 years of age, the time, duration, and location of the questioning, the fact that Miranda warnings were given, and defendant Garcia's lack of experience with the criminal justice system.

IT IS ORDERED denying defendant Garcia's Motion to Suppress Statements.

APPENDIX E

JUVENILE MIRANDA WARNINGS

Date/Time: October 25, 1991 9:25 P.M. DR # 91-16695

Location: MAJOR CRIMES TASK FORCE

Officer: P. Riley Serial Number: 679

Subject: JONATHAN A. DOODY Age/DOB: 17 5-9-74

Address: 13235 W. TUCKEY LN. GLENDALE, AZ 85307

Subject's Signature: _____

Juvenile's present grade in school? 11 If juvenile is not in school, last grade completed? N/A
(self-reported)

Juvenile's reported performance in school?
B AVERAGE

These are your Miranda Warnings:
(Subject shall place his initials in the blank following the "Yes" or "No" response, as appropriate.)

1. **You have the right to remain silent.** (This means that you do not have to talk to me or answer any questions about this offense. You can be quiet if you wish.) Do you understand this? Yes JAD No___

2. **Anything you say can and will be used against you in a court of law.** (This means that anything you tell me, I can use later against you in court. A court of law is a place where a judge will decide whether you did [explain what the juvenile is suspected of]. A judge is like an umpire in a baseball game. He decides whether you have acted in a right or wrong way. If you did something wrong, you may be punished.) Do you understand this right? Yes JAD No ____

3. **You have the right to have an attorney present prior to and during questioning.** (This means, if you want one, you are allowed to have a lawyer here before and during my questions to you. An attorney is a lawyer who will speak for you and help you concerning the crime which we think you have done.) Do you understand this right? Yes JAD No ____

4. **If you cannot afford an attorney, you have the right to have one appointed for you prior to questioning.** (This means if you do not have the money to get a lawyer, if you wish, one will be given to you free of charge before you are questioned.) Do you understand this right? Yes JAD No ____

5. Do you want to have your parent(s) or guardian(s) present during questioning? Yes ____ No JAD

6. **The possibility exists that your case may be handled by adult court.** (This means that a

juvenile judge may decide that you do not belong in juvenile court because you are too old, have committed a serious crime, or have committed too many crimes before this one. If you are taken to adult court, you may get more punishment than you would receive in juvenile court.) Do you understand that?
Yes JAD No ____

If you want to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

Do you understand each of these rights?
Yes JAD No ___

APPENDIX F

DR #91-16695
TAPE 31 (16284), SUBJECT: JONATHAN DOODY
INTERVIEWER(S): P. RILEY, D. MUNLEY
DATE OF INTEVIEW: OCTOBER 25, 1991, 2125 – 2212 HOURS
TRANSCRIBED: OCTOBER 30, 1991, A-246

RILEY: How ya doin' there, JONATHAN? Hey you know what, ah, RICK is, RICK is tied up right now doing a few things, ah, like I told you, I'm, I introduced you as, as, my name is PAT. This is ah DAVE MUNLEY, he's with the Sheriff's Office too.

DOODY: Hi.

MUNLEY: How you doing.

RILEY: Ah, if you don't mind I'd like to be able to just ah, I, I had a conversation with RICK about some of the things that he had discussed with ah you and some of the other guys before, so I'm familiar with most of the things that ah that he was asking questions about and things like that, so, what I'd like to do is just probably go ahead and do that with you ah, until RICK can break away and ah maybe come on in and join us a little bit later on.

DOODY: Okay.

RILEY: But ah to save time, uh and to get you back to doing with you need to do, might as well as just go ahead and start on things to save you some time and get things squared away. Ah, what I'd like to do first though, Jonathan, since we're in kind of a formal setting and things like that and because DAVE's a police officer and I'm a police officer and things like that ah sometimes some of the questions that we get into are, are a little bit sensitive and ah things like that. Ah, and what I'd like to do is before we, we go into that is ah, read something to you ah, and so that you understand some of the protections and things that ah, that you have. It's not meant to scare you or anything like that, ah don't ah don't take it out of context, okay.

DOODY: Okay.

RILEY: It's only something for, for your benefit and for our benefit, okay.

DOODY: Okay.

RILEY: And ah it's just so that you understand, and that ah, if you have any questions, by all means ask me, okay. I'd be more than happy to explain it to you and ah, and answer any questions that you have about anything, okay. So if there's a question that pops up in your mind at at any time, feel free to ask me, okay.

DOODY: Okay.

RILEY: Cause I'll, I'll be more than happy to explain it to you, okay?

DOODY: Okay.

RILEY: Ah, I'm sure you've heard this thing and you've heard it said on t.v. and things like that and it's not quite like t.v. portrays it ah, it's a little more, little less ah technical and a little less heavy if you want to put it ah that way, ah again, all it is, is its something that's ah for your benefit, as well as for our's, okay. Just so that you understand everything. What, what it's called is a Miranda Warning, okay. Have you heard that before?

DOODY: No.

RILEY: They call it Rights on t.v., okay. What, what that is and basically all that is Jonathan is, it's not necessarily something that is, like on t.v. where they portray it when somebody's ah guilty of doing something, ah, we read these things to people on somewhat of a regular basis, whether they're responsible for doing something or not, okay. So I don't want you to feel that because I'm reading this to you that we necessarily that you're responsible for anything, it's for your benefit, it's for your protection and for our's as well, okay?

DOODY: Okay.

RILEY: So as, as long as you understand that. I need to read this thing though, to you okay, and just make sure you understand everything and again like I said if you have any questions, by all means ask me, okay.

DOODY: Yeah.

RILEY: Ah, let me first write a few things down here real quick, like the date and time, it being October 25th, it is October isn't it.

MUNLEY: Uh-huh.

RILEY: I've kind of lost track of time in the last few days. What do you got, nine, nine twenty-five?

MUNLEY: Yeah.

RILEY: Yeah, I was telling Jonathan on my way over here, my battery in my car phone went...

MUNLEY: Dead on you again.

RILEY: Went capoots.

MUNLEY: PAT probably already explained it to you, but while we're sitting here talking, if you need anything, feel free to go ahead and ask...

DOODY: Okay.

MUNLEY: ...if you need something to drink, use the bathroom, you know if you need something to eat, we'll provide it for you, okay.

DOODY: Thank you.

RILEY: Any time you feel like you got to go let us know, just tell me hey, I got to go to the bathroom or I want a drink, we'll be more than happy to get it for you.

MUNLEY: You're in the R....R.O.T.C.?

DOODY: Uh-huh.

MUNLEY: At ah...

DOODY: Agua Fria.

MUNLEY: Agua Fria. How long have you been in there?

DOODY: Humm, three years.

MUNLEY: Is that your uniform?

DOODY: Yeah.

MUNLEY: You guys have a special event tonight?

DOODY: Ah yeah, we had a football game and ah I had to present the colors.

MUNLE: Oh yeah, you're on the rifle team too?

DOODY: Um, actually the Honor Guard. It's, let me see, Color Guard is basic like you have a Color Guard and people that carry the flag, you have the Honor Guard, people that do the rifle, and then you have your Drill Team, a lot of people that to do the rifle.

MUNLEY: Uh-huh.

RILEY: So do you do both that stuff?

DOODY: Yeah.

RILEY: Pretty good at it?

DOODY: Kind of.

MUNLEY: Lot of fun?

DOODY: Yeah.

MUNLEY: That's good.

DOODY: Except when you drop the rifle.

MUNLEY: That's good training for you.

DOODY: Yeah.

RILEY: Hey JONATHAN ah, how old are you now?

DOODY: Seventeen.

RILEY: Seventeen? What's your birth date?

DOODY: Ah, ninth, May.

RILEY: Uh, ninth of May?

DOODY: Uh-huh.

RILEY: Okay and the year is what?

DOODY: '74.

RILEY: '74? Okay. Yeah what, what would be your address that you're at right now or where you're staying?

DOODY: Ah 13, I'm not sure, I haven't memorized it yet.

RILEY: Just one of these fill in the blanks things here. Is that 13235 West Tuckey?

DOODY: Yeah, Glendale.

RILEY: Okay.

(short pause/no conversation)

MUNLEY: Did you just move in over there?

DOODY: Uh-huh, about a month, never had the chance to memorize the uh, well memorize the street, just not the number.

RILEY: Is, is this ah, who's residence would this be that you're at?

DOODY: Ah, GARCIA, I forgot his first name.

RILEY: Is that a friend of your's?

DOODY: Yeah.

RILEY: Okay; so it's the ah, GARCIA's residence?

DOODY: Uh-huh.

RILEY: Okay. Okay and you're in what's, what grade in school right now?

DOODY: Eleven.

RILEY: Eleventh? Okay. And ah, what kind of grades are you getting right now in school, as far as ah in average?

DOODY: Ooh, I don't really don't know, cause the report card never came out yet.

RILEY: Okay ah, how about the last report card that you got what what kind of average did you get?

DOODY: About a B A.

RILEY: B average? Okay. They using letters or numbers now days or..

DOODY: Actually both.

RILEY: Both. The reason I ask that is just to get an idea of how well ah, you understand things

and everything. Okay, and I'm just going to read these verbatim off the, the sheet here and then ah, as I said, if, if you have any questions by all means ask me, okay.

DOODY: Okay.

RILEY: And again, it's not meant to scare you so don't don't take it out of context JONATHAN okay. Ah what this is, is that ah you have the Right to Remain Silent and ah, what it states is that this means that you do not have to talk to me or answer any questions about ah, the matter that we're going to discuss with you, okay. You can be quiet if you, if you wish. Okay, did you understand that?

DOODY: Uh-huh.

RILEY: Okay, ah, as we go here, they ah, they ask that you initial ah, here indicating that I read it to you and that you understand it. Ah, so if you could ah, as we go, I will go ahead and just have you initial in the box.

DOODY: Okay.

RILEY: Okay. And the next one is that Anything that you say can and will be used against you in a court of law and what this means is that anything that you tell me, I can use later against you in court and a court of law is a place where a judge will decide whether ah, you did something or whether you didn't do something, okay. And a judge is like an

umpire in a baseball game. He decides whether you have acted in a right or wrong way, okay. Ah, if you did something wrong ah you may be punished and if you didn't you won't be punished, okay. Do you understand all of that?

DOODY: Uh-huh.

RILEY: Okay, if you could just initial there. Okay, and the next one states that you have the right to have an attorney present prior to and during questioning, and what that means that if you want one, you're allowed to have a lawyer here before and during you know my questions to you, okay. And then an attorney is a lawyer who will speak for you and help you concerning the crime or any kind of offense that ah we might think that you or somebody else is involved in, if you were involved in it, okay. Again, it not necessarily mean that you are involved, but if you were, then that's what that would apply to okay. And do you understand that?

DOODY: Yeah.

RILEY: Any questions?

DOODY: No.

RILEY: Okay. Okie doke.

DOODY: Oh yeah what's this for?

RILEY: Ah, okay I'll, again I'm gonna go in and, and explain some things to you. Ah, in the next one states that if you cannot afford an attorney, you'd have the right to have one appointed for you prior to questioning okay, and what this means, is if you do not have the money to get a lawyer ah, if you wished ah, one will be given to you free of charge before any questions and things like that, okay. Do you understand that?

DOODY: Uh-huh (indicating yes)

RILEY: Okay. Okay and there's one other thing under here and it says that ah, do would you want to have your parent or guardian present during our conversation with you now?

DOODY: Ah, it doesn't matter.

RILEY: It doesn't matter?

DOODY: Uh-huh.

RILEY: Okay. Ah, so you will be willing to talk with us right now?

DOODY: Yeah.

RILEY: Okay. And, if you just initial there where it says ah, since you say it doesn't matter, and, and that you'd be willing to talk to us ah...

DOODY: No?

RILEY: ....No, would be apparently the right response. Okay. And there's one other statement here is that ah, the possibility exist that ah, if this was, was your case or something that you might be involved in ah, the possibility is that it could be he handled by the adult courts, and ah what that means is that a juvenile judge could decide ah, that ah, you, if you were responsible for something do not belong in a juvenile court because you're either too old or that you ah, may have committed a serious crime or have committed too many crimes before this particular one or anything else. And if you're taken to adult court you may get more punishment than you'd receive in a juvenile court and that's all that basically says, okay. Do you understand that?

DOODY: Yeah.

RILEY: Okay.

DOODY: Ah...

RILEY: If you understand it then Yes would be the right one, yeah. Okay, okie doke. And at the bottom here is what it's saying is that if ah, you have no problem with ah talking to myself and David here right now, with ah, without anybody else present or attorney, or your parents, or, or anyone ah, then as I said we have some things we'd like to ask you and we'd like to do that. Ah, and if you have no problem with that, we'd like to talk to you

about that. Ah, but if you want to then ah, to stop at any time, that's something you can do as well, okay. Uh, do you have any questions at all about any, any of these things I've, I've explained to you?

DOODY: Ah, No.

RILEY: Okay. Do you understand all the things that I have read to you?

DOODY: Yes.

RILEY: Okay. And all that says here is that you do understand all those, and if you do, if you'll just initial the right box there. Okay. And again, is there any questions at all JONATHAN about, about any of that that I read to you?

DOODY: No, no.

RILEY: Okay. Alrighty.

MUNLEY: That might be real overwhelming to you, but just try to relax, it is something that you know, it's kind of a formal thing that we have to do, and ah, you, you look a little nervous, you look real tense...

DOODY: Yeah.

MUNLEY: ...just try to relax and...

DOODY: Okay.

MUNLEY: ...it's gonna be ah....

RILEY: The ah, as, as DAVE said ah JONATHAN unfortunately in the job that we do, JONATHAN, we, we talk to people every day, and we ask them questions that are personal and sometimes ah, may implicate them in things that ah, could be conceived as a wrong or a crime or an offense or whatever you want to call it. And because of that, we have to make sure that we, we protect everybody's interest and we explained things to, to them and that's what that process entails, okay. It's just to make you understand and let you know what those are, and again like I said, it's not meant to scare you or anything like that.

DOODY: Okay.